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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902

No. ~~182~~ 70.

S. M. BURT AND H. R. BURT, PETITIONERS,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 1, 1901.
CERTIORARI AND RETURN FILED MAY 10, 1901.

(18,095.)

(18,095.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 282.

S. M. BURT AND H. R. BURT, PETITIONERS,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 25, 1901.

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a *Caption.*

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth judicial circuit, begun on the third Monday of November, 1899, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

S. M. BURT and H. R. BURT, Plaintiffs in Error,
vs.
UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, Ohio, Defendants in Error. } No. 864.

Be it remembered that heretofore to wit on the 4th day of August, 1899, a transcript of the record of the above-styled cause from the circuit court of the United States, for the western district of Texas was filed in the office of the clerk of said United States circuit court of appeals, in the words and figures following to wit:

1 *Caption.*

Be it remembered, that there was opened and begun to be holden, at Austin, Texas, a regular term of the United States circuit court for the western district of Texas, fifth circuit, on the 3rd day of July, A. D. 1899; it being the first Monday in said month, and the day fixed by law for commencing a regular term of said court at said place.

Present: The Honorable Thomas S. Maxey, United States district judge.

Honorable Henry Terrell, United States attorney for said district;

George L. Siebrecht, United States marshal for said district, and

D. H. Hart, clerk of said court; when and where the following, among other proceedings, were had to wit:

S. M. & H. R. BURT
versus.
THE UNION CENTRAL LIFE INSURANCE COMPANY. } No. 2306.

Plaintiffs' First Amended Original Petition.

Filed July 7, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit, July Term, A. D. 1899.

S. M. and H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE Company of Cincinnati, Ohio. } No. 2306. Common Law.

To the honorable the circuit court of the United States for
2 the western district of Texas, at Austin, fifth circuit:

Come now, by their attorney, your petitioners, S. M. Burt and H. R. Burt, and under leave of court, first had, file this their first amended original petition in the above numbered and entitled cause, amendatory and in lieu of their original petition, filed herein on the 16th day of December, A. D. 1898, and thereupon, complaining of The Union Central Life Insurance Company, of Cincinnati, Ohio, a corporation, which will be hereinafter styled defendant, respectfully represent:

First. That petitioners both reside in the county of Travis and State of Texas, while defendant is a private corporation, duly incorporated under the laws of the State of Ohio, having its principal office in the city of Cincinnati, in the county of Hamilton, and State of Ohio, its president being one John M. Pattison, who also resides in said last-named city, county and State, and having also an agent for the transaction of its business in said Travis county, Texas, to wit: one W. A. Boswell, who also resides in said last-named county and State.

Second. That heretofore, to wit: on or about the 1st day of August, A. D. 1894, said defendant for a valuable consideration, made, executed, issued and delivered to one William E. Burt, of said Travis county, Texas, its certain contract, or writing obligatory, to wit: a policy of life insurance on the life of said William E. Burt, (a copy whereof is hereunto annexed, marked Exhibit A and made part hereof), whereby, in consideration of the annual payment to it of the sum of one hundred and fourteen dollars and seventy cents, at its home office, on or before the 30th day of July, at noon, in every year during the term of twenty years from the date of said policy, and of the payment when due of any and all notes given for premiums or parts of same, said defendant bound itself to pay to Anna M. Burt, the wife of said William E. Burt, if living, otherwise to his executors, administrators or assigns, the sum of five thousand dollars, within sixty days after the receipt by defendant of notice and satisfactory proof of death of said William E. Burt.

Third. That thereafter, to wit: on or about the 10th day of September, A. D. 1895, the said named beneficiary Anna M. Burt, joined by her said husband William E. Burt, made, executed and delivered, for a valuable consideration, to petitioners, who then were and still are creditors of said William E. Burt and Anna M. Burt, and were both brothers of said William E. Burt, a written conveyance, transfer or assignment whereby they assigned and conveyed to petitioners
a one-half interest in said policy and the proceeds thereof,
3 and in virtue whereof petitioners then became and now are
the owners of and entitled to, the said one-half share.

Fourth. That thereafter, to wit: on or about the 24th day of July, A. D. 1896, said William E. Burt, being still alive, his said wife Anna M. Burt, died intestate, as did also on the same day her and said William E. Burt's two minor female children, Agnes Lucile and Anna E. Burt (the said two children being both unmarried and without issue or descendants) said two children being the only issue or descendants of her marriage with said Burt, or of either him or herself.

Fifth. That thereafter, to wit: on or about the 4th day of February, A. D. 1897, said William E. Burt, being then the sole owner and successor of and to all the rights and interest of said Anna M. Burt in and under said policy of insurance, for a valuable consideration made, executed and delivered to petitioners his certain written transfer, conveyance and assignment, whereby he assigned and conveyed to petitioners the said policy, together with all and singular his right, title and interest therein, authorizing them to receive and collect same when due and payable, and that thereby petitioners became entitled to and are now the owners of the remaining one-half interest in said policy.

Sixth. That whatever may be, or held or adjudged to be, the effect of said two instruments of assignment, or either of them, petitioners have become, and now are, nevertheless entitled to and the owners of said policy, the amount secured and agreed to be paid thereby and of any proceeds thereof, because they say that when the said insured William E. Burt died, as hereinafter stated, he died intestate, unmarried and without issue or descendants, and leaving surviving him neither father or mother, grandparents nor sister or brother, other than petitioners, nor their descendants, so that petitioners, who are as aforestated his brothers, are and were his only heirs-at-law, and became and were, and now are, as such heirs, there being no administration on his estate nor necessity therefor, the legal owners and holders of said policy and entitled to the full amount agreed thereby to be paid, to wit: said sum of five thousand dollars, according to the legal tenor and effect of said policy.

Seventh. That thereafter, to wit: on or about the 27th day of November, A. D. 1896, the said insured William E. Burt, having been indicted under the alias of Eugene Burt, for the murder of his said wife, Anna M. Burt, in the district court of Travis county, Texas, twenty-sixth judicial district, a court of competent jurisdiction, was in said court tried and convicted therefor of the offense of murder in the first degree, as in said indictment charged, and his

punishment assessed at death, the defense of insanity having
4 been interposed and put in issue, among other things, on the trial, and that thereafter, to wit: on or about the 26th day of April, A. D. 1898, in pursuance of said conviction, by a judgment and sentence of said district court on that day, said William E. Burt was by said district court sentenced to be hanged; and that thereafter, to wit: on or about the 27th day of May, A. D. 1898, pursuant to said judgment and sentence, and in virtue of a death warrant issued thereunder, the said William E. Burt was executed by the sheriff of Travis county, Texas, the proper officer to execute said sentence, by being on that day hanged by the neck until dead, and so on said day the said insured departed this life.

Eighth. That notwithstanding said conviction, judgment and sentence, said William E. Burt, the insured did not in fact commit said offence, nor in fact kill or bring about the death of the said Anna M. Burt, his wife, nor participate therein, nor was he guilty of said crime. And further petitioners aver that, even if (which is not admitted but again expressly denied) the said William E. Burt participated in the death of his said wife, said Anna M. Burt, or in fact actually killed her, yet such participation or act, if any, on his part, violated no condition or obligation, express or implied in anywise incumbent on him under said policy, nor avoided said policy nor his agreement and contract of insurance thereunder, nor forfeited any right of either himself or petitioners thereunder, because they say that at the time of the death, as aforesaid, of said Anna M. Burt, said insured William E. Burt, although of sound physical health had become and was insane, or of such a perverted and deranged condition of his mental and moral faculties as to render him incapable of distinguishing between right and wrong, and unconscious at the time of said act, if act there was, by him committed, of its nature, or, though conscious of said act and also able to distinguish between right and wrong and know the act to be wrong, yet his will, or the governing power of his mind, had been involuntarily on his part, so completely destroyed that his actions were not subject to it, but were beyond his control. And so petitioners say that there was and is no forfeiture of said William E. Burt's or their rights under said policy, nor any release or discharge of any liability of defendant or in virtue of said policy, even if said William had actually killed the said Anna M. Burt, which is again denied.

Ninth. That at the time of the death of said William E. Burt, the insured, said policy of insurance was a valid, binding and subsisting contract, and in full force and effect, and the first and second annual premiums due thereon, on to wit: respectively July 30,
5 1895, and July 30, 1896, had been fully paid to, and received, accepted and receipted for by, said defendant, and that, as to the only other annual premium falling due or becoming payable during the lifetime of said assured, same being the sum, as were the other two premiums, of one hundred and fourteen dollars and seventy cents, was on the day same became due, to wit: on the 30th day of July, A. D. 1897, before the hour of 12 o'clock noon of said day, as provided in said policy, duly and legally offered and ten-

dered to said company, defendant, and to its president said John M. Pattison, at the home office of defendant in the city of Cincinnati, in the State of Ohio, and acceptance thereof refused, and said company and its said president then and there notified that said money was held, would be held and kept ready to be, and would be, at any time then or thereafter, paid to defendant, or its agents or order. And petitioners further say that said money is now, and has ever since been, kept and held ready to be so paid, and they now here again tender and offer to so pay same to defendant or to pay same into court to be dealt with as the court shall direct, although they say that by its refusal to accept same defendant has waived its rights to such payment.

Tenth. That heretofore, to wit: on or about the 28th day of June, A. D. 1898, petitioners, being the sole legal owners and holders of said policy, and entitled to the said sum of five thousand dollars agreed to be paid thereby on the death of said William E. Burt, by defendant, within sixty days after receipt by it of notice and satisfactory proof of his death, presented to defendant, and it received such due and satisfactory notice and proof, as required by said policy, and made due demand of defendant for payment of said sum to them.

Eleventh. That by reason of the said death of said William E. Burt, the said sum of five thousand dollars agreed in said policy to be paid, thereupon became due, and the said period of sixty days after receipt by defendant of notice and satisfactory proof of his death having expired prior thereto said sum became payable on or about the 28th day of August, A. D. 1898, and is now long past due. But petitioners say that although they are justly and legally entitled thereto, and although same is long past due, and although petitioners have often demanded payment of same, yet defendants have hitherto wholly failed and refused and still refuses to pay same, or any part thereof, to petitioners' great damage, to wit: ten thousand dollars.

Twelfth. That by reason of the facts aforestated and because defendant being a life insurance company, and liable therefor, has failed within the said sixty days specified in said policy, and after demand made therefor, as aforesaid, to pay the said sum of five thousand dollars by said policy agreed to be paid, defendant has become liable and bound to pay to petitioners, the holders
6 of said policy, in addition to the said amount thereof, the further sum of twelve per cent. of said amount, or six hundred dollars, as damages, and also, further, all their reasonable attorneys' fees for the prosecution of this suit and the collection of said amounts. And petitioners say that because of the failure and refusal of defendant to pay said policy they have been compelled to institute this suit and employ the services of attorneys-at-law and counsel therein, and pay their fees, and that reasonable fees for services of such counsel will amount to the sum of twenty-five hundred dollars.

Premises considered, petitioners pray judgment for their said

debt, damages, interest, attorneys' fees and costs, and for general relief, etc.

GARDNER RUGGLES,
Attorney for Petitioners, S. M. & H. R. Burt.

"EXHIBIT A."

The Union Central Life Insurance Company.

No. 133,671. $5,000 (amount). $114.70 (premium).

Age, 26.

In consideration of the statements made in the application for this policy, which application is hereby made a part of this contract, and of the annual payment of the sum of one hundred fourteen and $\frac{70}{100}$ dollars, at the home office of the company, on or before the 30th day of July, at noon, in every year, during the term of twenty years from date hereof, and of the payment when due of any and all notes given for premiums, or parts of same, does insure the life of William E. Burt (the insured) of Austin, in the county of Travis in the State of Texas, in the amount of five thousand dollars, without participation in profits, for the term of his natural life. Upon the death of the insured the company agrees to pay at its home office, said amount of insurance to Anna M. Burt, his wife, if living, otherwise to the executors, administrators or assigns of the insured, within sixty days after the receipt of notice and satisfactory proof of death, the balance of the year's premium, with any and all other indebtedness to the company, being first deducted. This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page hereof, which are made a part of this contract, which contract shall be held and construed to have been made in the city of Cincinnati, Ohio.

After three years' premiums shall have been paid on this policy except in case of failure to pay at maturity a note given for premium or for a loan upon the security of this policy, the company will, upon legal surrender of this contract, before default of the payment of any premium, issue a paid-up, non-participating policy, payable as herein provided for the amount as named in Table A, on the following page.

In case of default in the payment of any premium after the third, except in case of failure to pay at maturity, a note given for premium, or for a loan upon the security of this policy, no surrender for a paid-up policy having been made, as afore provided, this policy will be continued in force only as a paid-up non-participating term policy, for such time only as named in Table C on the following page. If the death of the insured occurs, while the aforesaid term policy is in force, there shall be deducted from the amount insured a sum equal to the regular annual premiums, with interest that would have accrued had this policy been kept in force, said deduction not to exceed three regular premiums with interest.

Upon legal surrender of this policy on the 30th day of July, A. D. 1915, the company will pay in cash its entire reserved value, according to the actuaries' table of mortality, with 4 per cent. interest, to wit: the sum of $2,194, provided this policy shall not have been terminated previously, by lapse, death, or otherwise.

In witness whereof, the Union Central Life Insurance Company, by its president and secretary, signs this contract, at Cincinnati, Ohio, this 1st day of August, 1895.

JOHN M. PATTISON, *President.*

[SEAL.] E. P. MARSHALL, *Secretary.*

Conditions.

First. The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance.

Second. No suit to recover under this policy shall be brought after one year from the death of the insured.

Third. If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by self-destruction, whether sane or insane, within three years from date hereof, this policy shall be null and void, and in case of said avoidance the reserve value only, according to the actuaries' table of mortality, with four per cent. interest, shall be paid on the surrender of this policy.

Except as hereinbefore provided, this policy shall be incontestible from any cause except misstatement of age. In case the age of the insured shall have been misstated the amount payable hereunder shall be such proportion of the sum insured as the premium paid bears to the required premium at the correct age of the insured.

Notice to Policy-holder.

All payments due on this policy for premiums or notes or interest upon notes given to the company, are payable at the office of the company in the city of Cincinnati, or to the authorized agent of the company on the production of the premium receipt (signed by the president or secretary) or the note given in payment of the premium.

The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the presi-

dent or secretary of the company, whose authority for this purpose shall not be delegated.

Should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest produced with proofs of death. This company does not guarantee the validity of any assignment.

Indorsement: No. 2306. Law. S. M. & H. R. Burt *vs.* The Union Central Life Insurance Co. Plaintiffs' first amended original petition. Filed July 7, 1899. D. H Hart, clerk. Gardner Ruggles, attorney for petitioners.

Defendant's First Amended Original Answer.

Filed July 7, 1899.

S. M. & H. R. BURT
vs.
UNION CENTRAL LIFE INSURANCE COMPANY.

9 Suit pending in the circuit court of the United States for the western district of Texas.

And now comes the defendant, and with leave of the court had and obtained, files this, its first amended original answer, in lieu of its original answer filed herein on the 7th day of February, 1899, and says:

It demurs to the first amended original petition of plaintiffs filed herein on the 7th day of July, 1899, and says that the same is insufficient to state a cause of action against this defendant, for the reason that it appears from the allegations therein that the assured died at the hands of the law under judgment of a court of competent jurisdiction; and of this, defendant prays the judgment of the court.

GEORGE F. PENDEXTER,
GEO. E. SHELLEY,
Attorneys for Defendant.

And for special exception herein, if need be, defendant says that so much of said petition as seeks to recover attorneys' fees, and twelve per cent. on the amount of the policy sued upon, for the reason that the laws of Texas, to wit: art. 3071 Revised Statutes of Texas, under which said claim is asserted, is in contravention of the fourteenth amendment to the Constitution of the United States, and hence states no valid cause of action against this defendant; and of this it prays the judgment of the court.

GEO. F. PENDEXTER,
GEO. E. SHELLEY,
Attorneys for Defendant.

And for answer herein, defendant denies all and singular the allegations in plaintiffs' petition contained, except in so far as the same are hereinafter admitted to be true, and demands strict proof of the same; and of this it puts itself upon the country.

And for answer in this behalf, defendant says that the plaintiffs ought not to have and maintain this suit, because the policy made the basis thereof, and all rights thereunder, were forfeited because the second premium due thereon was not paid on the date it fell due, to wit: July 30, 1896, and defendant says that by the terms of said policy, it is provided as follows:

"The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes or interest upon notes given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy are hereby made a part of this contract of insurance."

And said policy contains the further provision and stipulation, to wit:

"All payments due on this policy for premiums, or notes, or interest upon notes given to the company, are payable at the office of the company in the city of Cincinnati, or to the authorized agent of the company, on the production of the premium receipt (signed by the president or secretary) or the note given in payment of the premium."

That William E. Burt to whom said policy was issued was living on the 30th day of July, 1896, the day upon which the second premium thereon was due as aforesaid; that said William E. Burt failed and refused to pay said premium on said day, or to tender payment thereof, but that thereafter, to wit: on or about August 1, 1896, the plaintiffs herein tendered to Jefferson Johnson, who, at that time, was the duly authorized agent of defendant, at Austin, Texas, appointed by it under and by virtue of the provision of the policy hereinbefore set out, to receive said premium, and who, at that time, held the regular renewal receipt for said premium duly signed by the proper officers of defendant, of which fact plaintiffs then had notice, and which said tender was by said Johnson refused, and no receipt delivered therefor; that previous to the time said premium fell due, the said William E. Burt did, on, to wit: the 24th day of July, 1896, at Austin, Texas, murder his wife, Anna M. Burt, the beneficiary named in said policy, and his two minor children, Agnes Lucile Burt and Anna E. Burt, and was, at the time said tender was made, a fugitive from justice, which fact was well known to plaintiffs, at and before the time they made said tender; that the crime of murder was and is a capital crime, under the laws of the State of Texas, and punishable by death; that thereafter upon the refusal of defendant's said agent, Johnson, to receive said second premium, the plaintiffs, for the purpose of over-reaching and defrauding this defendant, caused the amount of said premium to be remitted by telegraph from Austin, Texas, to the home office of defendant at Cincinnati, Ohio; that in the transmission of said amount, plaintiffs concealed from the officers of defendant, at Cincinnati, Ohio, the fact

that the said premium had been tendered to and refused by defendant's authorized agent, the said Johnson, and concealed and withheld from defendant the fact that William E. Burt was a fugitive from justice, suspected of and charged with, the murder of his wife, the said Anna M. Burt and her children, and of which facts defendant had no notice: that in the telegraphic tender of said premium, the plain-
11 tiffs falsely and fraudulently stated that the same was made on behalf of the beneficiaries, when they well knew that Anna M. Burt, the only beneficiary named in said policy was then dead; and defendant charges that it was the wilful, deliberate purpose of the plaintiffs in making said tender, to fraudulently conceal from defendant, the increased risk occasioned by the crime of the said William E. Burt; and further, to conceal from defendant the fact that the said Anna M. Burt, the beneficiary named in said policy was dead, and that said plaintiffs sought by said telegram to fraudulently conceal from defendant the further fact that they then claimed to be the sole beneficiaries under said policy; that said money was received by one W. L. Davis, an employé, to wit, cashier, in the home office of defendant, who defendant says had no authority or power to receive the same; that said Davis had not been appointed or authorized by defendant to receive said premium, or any other premium, and had not been given, and did not have, a renewal receipt for said premium signed by the president or secretary of defendant; that immediately after defendant learned of the facts aforesaid, it repudiated and disavowed the action of said Davis in receiving said premium and insisted upon the enforcement of said forfeiture, and at once tendered to plaintiffs the amount of said premium, and now here tenders the same in open court.

(3.) And defendant says that said policy contains the further provision, to wit: "The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose shall not be delegated." And defendant says that there was no agreement in writing by its president or secretary by which said forfeiture was waived. Wherefore, defendant says that it ought not, by reason of the facts aforesaid, to be held to have waived said forfeiture. And defendant further says that plaintiffs have never paid or tendered to be paid the third premium on said policy; wherefore the said policy under its terms, was forfeited.

(4.) And for further answer in this behalf, defendant says that William E. Burt, the assured, under whom plaintiffs claim, to wit: on the 24th day of July, 1896, murdered his wife, Anna M. Burt, the beneficiary named in said policy, and by reason of whose death alone could said William E. Burt become entitled to any interest in said policy, and that said Burt, by reason of said murder, forfeited any and all rights which he might otherwise have had as the
12 heir or next of kin of said Anna M. Burt, and therefore, that plaintiffs, as the heirs of the said William E. Burt, can have no right to recover on said policy.

(5.) And for further answer in this behalf defendant says, that on, to wit: October 12, 1896, said William E. Burt, under the alias of Eugene Burt, was indicted in the district court of Travis county, Texas, a court of competent jurisdiction, for the murder of his said wife, Anna M. Burt, and that thereafter to wit: on the 27th day of November, 1896, in said court, the said William E. Burt was duly and legally convicted of murder in the first degree, on said indictment, and his punishment assessed at death; and that on the trial of said W. E. Burt, his sanity, at the time he committed the offence for which he was on trial, was directly put in issue, and the jury found him to have been sane when said offense was committed. And that thereafter, to wit: on the 26th day of April, 1898, by virtue of said judgment of conviction, the said William E. Burt was, by said court, duly sentenced to be hanged; that thereafter, to wit: on the 27th day of May, 1898, the said William E. Burt was duly hanged by the sheriff of Travis county, Texas, under and by virtue of the death warrant issued under said judgment.

Wherefore defendant says that plaintiffs ought not to recover, because it would be against public policy to permit the plaintiffs to recover on said policy, the said William E. Burt having died at the hands of public justice in the manner hereinbefore stated.

Wherefore, defendant prays that plaintiffs take nothing by this suit, and that it go hence and recover of plaintiffs all costs.

GEO. F. PENDEXTER,
GEO. E. SHELLEY,
Attorneys for Defendant.

(Indorsed:) No. 2306. S. M. & H. R. Burt *vs.* Union Central Life Insurance Co. Defendant's first amended original answer. Filed this 7 day of July, 1899. D. H. Hart, clerk, by J. W. Hancock, deputy.

Judgment.

Entered July 10, 1899.

S. M. & H. R. Burt
vs.
The Union Central Life Insurance Company. } No. 2306.

13 And now, on this 10th day of July, 1899, this cause being regularly called for trial, came the parties by their respective attorneys and announced themselves ready for trial. Whereupon the general demurrer and special exceptions interposed by the defendant to the first amended original petition of plaintiff were submitted to the court; and the court, having heard the argument of counsel thereon, and being fully advised thereon, being of the opinion that the law is with the defendant:

It is therefore considered, ordered, adjudged and decreed by the court that said demurrer and special exceptions be and they are hereby sustained. And the plaintiff declining to amend the case is hereby dismissed. And it is further ordered, adjudged and decreed by the court that the plaintiffs take nothing by their suit, and that

the defendant go hence and recover of plaintiffs all costs in this behalf expended for which let execution issue. To which ruling and judgment of the court the plaintiffs then and there in open court excepted.

Plaintiffs' Petition for Writ of Error.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. Burt
vs.
The Union Central Life Insurance Company of Cincinnati, Ohio. } No. 2306. Com. Law.

To the honorable the judges of the circuit court of appeals of the United States for the fifth circuit:

Come now the above-named plaintiffs by their attorney, and complain that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said circuit court of the United States for the western district of Texas, at Austin, fifth judicial circuit, at its July term, A. D. 1899, of said court, against said plaintiffs, on the 10th day of July, A. D. 1899, manifest error hath happened to the great damage of said plaintiffs:

Wherefore, said plaintiffs, and each of them, pray for the allowance of a writ of error, and for an order fixing the amount of bond for a supersedeas in said cause, and for such other orders and
14 process as may cause the same to be corrected by the said circuit court of appeals of the United States for the fifth judicial circuit.

Dated this 10th day of July, A. D. 1899.

GARDNER RUGGLES,
Attorney for Plaintiffs.

Granted, July 10, 1899.

T. S. MAXEY, *Judge.*

(Indorsed:) No. 2306, com. law. S. M. & H. R. Burt *vs.* The Union Central Life Insurance Company of Cincinnati, Ohio. Plaintiffs' petition for writ of error. Filed July 10, 1899. D. H. Hart, clerk. Gardner Ruggles, attorney for plaintiffs.

Plaintiffs' Assignments of Error.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE COMPANY OF Cincinnati, Ohio. } No. 2306.

Come now the plaintiffs in the above numbered and styled cause, by their attorney, and file the following assignments of error upon which they will rely in their prosecution of the writ of error in said cause.

First Assignment of Error.

That the honorable, the circuit court of the United States for the western district of Texas, at Austin, fifth judicial circuit, erred in sustaining the demurrer interposed by the defendant to the first amended original petition of plaintiffs, filed in said cause on the 7th day of July, A. D. 1899, and by holding and deciding that the facts stated in the said amended original petition are not sufficient to constitute or show a cause of action in said plaintiffs' favor against said defendant.

Second Assignment of Error.

That said circuit court erred in sustaining the first ground
15 of demurrer interposed by defendant to the first amended original petition of plaintiffs, filed July 7, A. D. 1899, and by holding, deciding and adjudging that said amended original petition does not state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant, because it appears from said petition that William E. Burt, the assured in the policy of life insurance sued on, was indicted, tried, convicted and sentenced to death in a court of competent jurisdiction, of the offense of murder in the first degree and was executed in pursuance of such sentence, although it was also alleged in said petition that, notwithstanding such sentence and execution, said insured did not, in fact, commit, cause, or participate in said murder, but was at the time of its commission, and whether he committed or participated in it or not, insane, unconscious of the nature of his actions, if any, and wholly irresponsible therefore, said circuit court holding and deciding that the defense, amongst others of insured's insanity having been an issue in said criminal cause said conviction, sentence and execution of insured were conclusive as against plaintiffs' right to recover on the policy of insurance on his life, in controversy herein, whether insured in fact committed, caused or participated in said crime or not, and whether he was insane or not when it was committed.

Third Assignment of Error.

That said circuit court erred in sustaining the second ground of demurrer and special exception interposed by defendant to plaintiffs' said amended original petition, filed as aforesaid, in said cause, and by holding, deciding and adjudging that said amended original petition, in so far as it seeks a recovery by plaintiffs against defendant of the sum of twelve per cent. on the amount of the policy of life insurance sued on, as damages, and a recovery of attorneys' fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant in that behalf, because the statute or law of the State of Texas, to wit: article 3071, of the Revised Civil Statutes of the State of Texas, under and in virtue of which said two claims are asserted, is violative and in contravention of the fourteenth amendment to the Constitution of the United States.

Fourth Assignment of Error.

That said circuit court erred in rendering judgment against plaintiffs in said cause sustaining said demurrer and exceptions
16 and dismissing plaintiffs' suit upon the pleadings in said cause, and that said judgment is contrary to law and the facts as stated in said pleadings in said cause.

Wherefore the said plaintiffs pray that said judgment of said circuit court be reversed and such directions be given that full force and efficiency may inure to plaintiffs by reason of the aforesaid causes of action set forth and alleged in their said amended original petition filed in said cause.

GARDNER RUGGLES,
Attorney for Plaintiffs, Being Also Plaintiffs in Error.

(Indorsement:) No. 2306. Com. law. S. M. & H. R. Burt *vs.* The Union Central Life Insurance Company of Cincinnati, Ohio. Plaintiffs' assignment of error. Filed July 10, 1899. D. H. Hart, clerk.

Writ of Error Bond.

Approved and filed July 10, 1899.

Know all men by these presents: That we, S. M. Burt and H. R. Burt, as principals, and —— —— as sureties, are held and firmly bound unto The Union Central Life Insurance Company of Cincinnati, Ohio, in the full and just sum of five hundred dollars, to be paid to the said The Union Central Life Insurance Company of Cincinnati, Ohio, and its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 10th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at a session of the circuit court of the United States for the western district of Texas at Austin, fifth circuit, in a suit depending in said court, between the said S. M. Burt and H. R. Burt, plaintiffs, and The Union Central Life Insurance Company of Cincinnati, Ohio, defendant, a final judgment was rendered against the said S. M. Burt and H. R. Burt, plaintiffs, and the said S. M. Burt and H. R. Burt, plaintiffs, having obtained from said court a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the final judgment aforesaid, in the aforesaid suit, and a citation directed to the said The Union Central Life Insurance Company of Cincinnati, Ohio, defendant, is about to be issued,
17 citing and admonishing it to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said S. M. Burt and H. R. Burt, plaintiffs, shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

S. M. BURT. [SEAL.]
H. R. BURT. [SEAL.]
GEO. W. LITTLEFIELD. [SEAL.]
WM. R. HAMBY. [SEAL.]

Sealed and delivered in presence of:
SAM. SHELLEY.
FRANK SMITH.

Approved this the 10th day of July, A. D. 1899.

T. S. MAXEY,
United States Judge.

(Indorsement:) No. 2306, law. S. M. Burt and H. R. Burt *vs.* The Union Central Life Insurance Company of Cincinnati, Ohio. Bond. Filed July 10, 1899. D. H. Hart, clerk.

Plaintiffs' Bill of Exceptions and Approval of Same.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE Company of Cincinnati, Ohio. } No. 2306. Com. Law.

Be it remembered that on this the 10th day of July, A. D. 1899, the above numbered and entitled cause coming on for trial came on to be heard the demurrer and special exceptions of the defendant to the plaintiffs' first amended original petition, filed herein on the 7th day of July, A. D. 1899, as follows:

First. It was objected by defendant to plaintiffs' said amended original petition that same was insufficient in law to state a cause of action against defendant in favor of plaintiffs because it ap-
18 pears from the allegations thereof that William E. Burt the insured in the policy of life insurance sued on herein died at the hands of the law, it being alleged in said petition that said insured was indicted, tried, convicted and sentenced to death in a court of competent jurisdiction in that behalf, of the offense of murder in the first degree, notwithstanding a plea, in his behalf, among other defenses of his insanity, and was, pursuant to said sentence executed, although it was also alleged in said petition that notwithstanding said indictment, trial, conviction and sentence, said insured did not in fact commit said murder, nor cause nor participate in same, but that, if he did, or whether he did or not, he was at the time same was committed, insane, unconscious of the nature of his acts and wholly irresponsible therefor.

Second. It was objected also by defendant to plaintiffs' said amended original petition that same, in so far as it seeks a recovery, in favor of plaintiffs against defendant, of the sum of twelve per cent. on the amount of the policy of life insurance sued on by plaintiffs, as damages, and a recovery of attorneys' fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant, in that behalf, because the statute or law of the State of Texas, under and in virtue of which said two claims are asserted is violative and in contravention to the fourteenth amendment to the Constitution of the United States.

And thereupon the said objections of defendant to said amended original petition, as raised by its said demurrer and exceptions, were both sustained by the court, the court holding, as to said first ground of demurrer, that, insured's sanity having been in issue in said criminal cause, his conviction and sentence, and his execution pursuant thereto, were conclusive as against plaintiffs' right to recover on the policy of insurance on his life in controversy herein, whether insured in fact, committed, or caused or participated in said crime or not, or whether he was insane or not, when it was committed, and thereupon the court rendered judgment dismissing plaintiffs' suit.

And to the said rulings, and order and judgment of the court, sustaining said demurrer and exceptions and dismissing said suit, plaintiffs excepted and now here by their attorney present and tender this their bill of exceptions thereon, and pray that same may be settled and allowed and signed, sealed and certified by the judge of this court, as provided by law.

GARDNER RUGGLES,
Attorney for Plaintiffs.

19 In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE COMPANY of Cincinnati, Ohio. } No. 2306. Com. Law.

The above and foregoing bill of exceptions presented by plaintiffs is in all respects correct and is hereby approved, allowed and settled, and ordered to be made a part of the record herein.

Signed and dated this 10th day of July, A. D. 1899, a day of the July term, A. D. 1899, and done in open court.

T. S. MAXEY, *Judge.*

(Indorsement:) No. 2306. S. M. & H. R. Burt *vs.* The Union Central Life Insurance Company, of Cincinnati, Ohio. Plaintiffs' bill of exceptions and order settling and allowing same. Filed July 10, 1899. D. H. Hart, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between S. M. and H. R. Burt, plaintiffs, and The Union Central Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said S. M. and H. R. Burt, plaintiffs, as by said complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States circuit court of appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

20 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of July in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas, at Austin.

Allowed this, the 10th day of July, A. D. 1899.

T. S. MAXEY,
United States Judge.

(Indorsement:) No. 2306. S. M. & H. R. Burt *vs.* Union Central Life Insurance Company. Writ of error. Filed July 10, 1899. D. H. Hart, clerk.

I hereby waive issuance of citation in error and accept service thereof.

GEO. F. PENDEXTER,
Att'y for Def't.

July 10, 1899.

Stipulation as to Transcript and Waiver of Citation.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE Company of Cincinnati, Ohio.
No. 2306. Com. Law.

In this cause it is agreed by and between plaintiffs and defendant, as follows:

First. That defendant hereby waives actual issue and service of citation in error, and accepts service of same, and agrees to appear and join issue in the circuit court of appeals of the United States for the fifth circuit, just as if all formalities had been duly complied with.

Second. That the transcript of the record for said circuit court of appeals shall consist only of copies of the following papers, viz: (1.) Plaintiffs' first amended original petition, filed July 7, 1899. (2.) Defendant's first amended original answer, filed same day. (3.) Judgment and order of circuit court sustaining defendant's
21 demurrer and exceptions to plaintiffs' petition and dismissing plaintiffs' suit. (4.) Plaintiffs' petition for writ of error. (5.) Order thereon. (6.) Plaintiffs' assignments of error. (7.) Plaintiffs' bond for writ of error, and order of approval. (8.) Plaintiffs' bill of exceptions and order settling and allowing same. (9.) Writ of error; and (10.) this stipulation.

Third. Plaintiffs shall have until October 1st, 1899, to file their briefs in said circuit court of appeals, and defendants shall have until November 1st, to file its briefs.

Witness our hands this 10th day of July, A. D. 1899.

S. M. BURT AND
H. R. BURT, *Plaintiffs.*
By GARDNER RUGGLES, *Their Attorneys.*
THE UNION CENTRAL LIFE INSURANCE CO.
By GEO. F. PENDEXTER, *Att'y.*

(Indorsement:) No. 2306. S. M. & H. R. Burt *vs.* Union Central Life Insurance Company. Stipulation. Filed July 10, 1899. D. H. Hart, clerk.

(*Certificate of Clerk.*)

Dated July 13, 1899.

THE UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the circuit court of the United States for the western district of Texas, hereby certify that the foregoing on twenty-six pages contain a full, true and corret copy of all papers filed and proceedings had in case No. 2306, S. M. & H. R. Burt *vs.* The Union Central Life Insurance Company, of Cincinnati, Ohio, as same appear on file and of record in this office; and that the original writ of error and waiver of citation in error are incorporated in this record.

In testimony whereof, witness my official signature and seal, at office, in Austin, Texas, this the 13th day of July, A. D. 1899.

[SEAL.]

D. H. HART,
Clerk of the U. S. Circuit Court for the Western District of Tex.

22 (*Extract from Minutes.*)

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1889, April 25, 1900.

S. M. BURT ET AL. }
vs. } No. 864.
UNION CENTRAL LIFE INSURANCE COMPANY. }

This cause was regularly called this day, and submitted to the court upon briefs of counsel heretofore filed.

(*Extract from Minutes.*)

November Term, 1900, December 4, 1900.

S. M. BURT and H. R. BURT }
vs. } No. 864.
UNION CENTRAL LIFE INSURANCE COMPANY. }

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered, and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiffs in error S. M. Burt, and H. R. Burt, and the sureties on the writ of error

bond herein George W. Littlefield and Wm. R. Hamby, be condemned to pay the costs of this cause in this court for which execution may be issued out of said circuit court.

23 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

S. M. and H. R. Burt, Plaintiffs in Error,
vs.
THE UNION CENTRAL LIFE INSURANCE COMPANY OF Cincinnati, Ohio, Defendant in Error.
No. 864.

Petition for Rehearing by Plaintiffs in Error.

To the honorable the United States circuit court of appeals for the fifth circuit:

Your petitioners, plaintiffs in error in the above numbered and entitled cause, having carefully examined the opinion therein of this honorable court, think, and respectfully submit, that, with propriety, they may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to plaintiffs in error, on the following grounds, on which it is respectfully submitted that this court was in error in said opinion, to wit:

24 First. That, while a contract of life insurance in terms payable, notwithstanding the death of the assured at the hands of the law, as the result of capital conviction in the established courts of competent jurisdiction, in event such conviction should be unjust or unwarranted by the evidence, might and probably would be void, as being against public policy, the mere fact of the death of assured at the hands of the law as the result of such capital conviction, if he were in fact innocent (that is, either did not commit the crime or was insane when it was committed), would not avoid a contract of insurance otherwise valid.

Second. That the judgment and sentence to death of assured in a court of competent jurisdiction was admissible only because pleaded by plaintiffs in error, and even then could only establish the fact of its own rendition, and was neither admissible nor conclusive to establish the facts on which it was rendered, nor any of such facts, nor was it an adjudication of such matters as to be within any of the rules relating to *res adjudicata*.

Third. That liability of defendant in error on the policy of life insurance in controversy, same being originally a valid contract, could only be avoided by some subsequent act of the assured operating a forfeiture, and to effect such forfeiture assured must either have done some act expressly or impliedly forbidden, or omitted some duty expressly or impliedly required, by the contract. There is no omission of duty involved, and his sentence and death at the hands of the law furnished no such act, if in fact he was either innocent or insane at the time of the commission of the act for which he was convicted and executed.

Finally, plaintiffs in error respectfully suggest that this court

again consider the points taken in their brief filed herein to the effect that, the policy of insurance in controversy being silent thereon, the death of the assured William E. Burt at the hands of the
25 law as the result of the judgment and sentence of death pronounced upon him by the district court of Travis county, Texas, did not and could not preclude a recovery on said policy by plaintiffs in error, if in fact said Burt was either innocent of the crime for which he was convicted or insane at the time of its commission, if he did actually commit it.

Wherefore, upon the foregoing grounds, these plaintiffs in error respectfully pray this honorable court to grant them a rehearing of said case.

GARDNER RUGGLES,
Attorney and Counsel for Plaintiffs in Error, S. M. & H. R. Burt.

I, Gardner Ruggles, attorney and counsel for the plaintiffs in error herein, S. M. & H. R. Burt, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

GARDNER RUGGLES.

Austin, Texas, December 21, 1900.

26 (*Extract from Minutes.*)

November Term, 1900, January 15, 1901.

S. M. BURT and H. R. BURT
vs.
UNION CENTRAL LIFE INSURANCE COMPANY. } No. 864.

Ordered, that the petition for rehearing filed in this cause, be, and the same is hereby denied.

27 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

Filed December 4, 1900.

S. M. and H. R. BURT, Plaintiffs in Error,
vs.
UNION CENTRAL LIFE INSURANCE Co., Defendant in Error. } No. 864.

Error to the circuit court of the United States for the western district of Texas.

Before Pardee, McCormick, and Shelby, circuit judges.

The case is stated in the opinion.

Mr. Gardner Ruggles was on the brief for plaintiffs in error.

Mr. Geo. F. Pendexter and Mr. Geo. E. Shelley were on the brief for defendant in error.

SHELBY, circuit judge, delivered the opinion of the court.

This suit is on a life-insurance policy and is brought by S. M. Burt and H. R. Burt, citizens of Texas, against the Union Central Life Insurance Company, a corporation chartered under the laws of Ohio. The policy was issued by the defendant on August 1, 1894, for $5,000, on the life of William E. Burt, and was payable at his death to his wife, Anna M. Burt, if living, otherwise to the executors, administrators, or assigns of the insured, within sixty days after proof of death. The annual premiums for the policy were duly paid. The policy contained no provision for forfeiture in the event that the injured should be executed under sentence of the law. On September 10, 1895, Anna M. Burt and William E. Burt assigned in writing to the plaintiffs, to whom they were indebted, a one-half interest in the policy. Anna M. Burt died intestate on July 24, 1896. She left surviving her no descendants, and her hus-
28 band, William E. Burt, became entitled to any interest she had in the policy. By assignment from William E. Burt, and as his heirs and next of kin, the plaintiffs are the sole owners of the policy.

William E. Burt was indicted for the murder of Anna M. Burt in the district court of Travis county, Texas, and was tried on November 27th, 1896. In addition to the plea of not guilty, he plead insanity. He was found guilty by the jury of murder in the first degree, and was by the court sentenced to be hanged, and on May 27, 1898, pursuant to the sentence, he was executed by the sheriff of Travis county, Texas. These facts are all alleged in the plaintiffs' petition. The petition then avers that the insured, William E. Burt, was in fact innocent of the crime of which he was convicted. To quote the petition as abridged by the plaintiffs' counsel. "Notwithstanding said conviction and sentence, said William E. Burt, did not in fact commit said murder nor participate therein, but that if he did, his policy was not avoided thereby because he was insane." The defendant demurred to the petition because it appeared therefrom that the insured died at the hands of the law under judgment of a court of competent jurisdiction. The circuit court, Judge Maxey presiding, sustained the demurrer. The plaintiffs declining to amend the petition, the case was dismissed. In this court it is assigned that the circuit court erred in sustaining the demurrer.

The industry of counsel has been able to find but one case in which a suit was brought on a life-insurance policy when the insured had been tried and executed for the commission of crime. That case is The Amicable Society *vs.* Bolland, 4 Bligh. N. R. 194, 211, and it is better known and oftener cited as the Fauntleroy case. It was an action by assignees in bankruptcy to collect a policy of insurance on the life of one Fauntleroy. The policy was made payable to his administrators or assigns. Fauntleroy was convicted of forgery, then a capital offense, and was executed. The Lord Chancellor (Lyndhurst) delivered the opinion. After stating the case, he said: "The question under these circumstances is this:

Whether the assignees can recover against the insurance com-
29 pany the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the noble lord now present, and we have both come to the conclusion that the assignees cannot maintain this suit.

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself, this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connections? Now if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy as far as that condition went at least, altogether void." This case has been cited approvingly in many text books on insurance and by the Supreme Court of the United States, Ritter *v.* Mutual Life Insurance Company of New York, 160 U. S. 139. That it correctly states the law has never been questioned so far as as we know. It is quoted and relied on by the learned counsel for both parties to this suit. It is conceded, however that there is a material difference between the facts of that case and this. Here the petitioners aver that the insured was
30 guiltless although convicted and executed. They aver in another count that, if he actually killed his wife, he was insane when he committed the act, and that the defense of insanity was presented unsuccessfully at the trial. If the insured did commit the homicide when insane, he was not guilty of murder. The meaning of the petition, therefore, is that at the trial of Burt, the insured, there was a miscarriage of justice—that he was unjustly convicted. It must be and is conceded as settled law that, if he had been rightfully convicted, his assignees could not recover on the policy because, as was held in the Fauntleroy case, (stating the point most favorably for the plaintiffs in error) the policy would have been void if it had expressly provided for payment of the amount thereof on the just conviction and execution of the insured. Does a contract for insurance, having no special provision on the subject cover the loss when the insured is tried and convicted in and executed

by an order of a court of competent jurisdiction, when he is in fact innocent of the crime with which he is charged? This precise question, we are advised by counsel, has never been decided. We will apply to the question the illustration used by the court in the Fauntleroy case. Would the policy sued on have been valid if it had provided, in the event of the insured's being indicted, tried, convicted, and executed for murder, when in fact he was innocent, that the amount of the policy should be paid to his administrators or assigns? This condition would not be as encouraging to the insured determined on crime as that supposed by Lord Lyndhurst, but it would at least let him understand that the provision he had made by insurance for those connected with him would not be conclusively lost by his conviction and execution,—that the beneficiaries would have a right of action on the policy with chances of success, even if he was apprehended, convicted and executed.

It is well settled that no one can lawfully contract to do that which has a tendency to be injurious to the public or against the public good. Can there be a legal life insurance against the miscarriage of justice? Can contracts be based upon the probability of judicial murder? If one policy so written be valid, the busi-
31 ness of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied, in a kind of accident insurance to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another court and jury not infallible. That juries and courts do make mistakes is unquestionable. It may be admitted that the history of criminal jurisprudence shows that innocent defendants have in rare instances, by a departure from proper rules of evidence, been convicted of murder and executed. Cases in which the juries, the courts, and the pardoning power are so at fault, are so rare that they are not likely to be in the contemplation of parties making contracts of life insurance. The terms of the contract of life insurance, it seems, would exclude the idea, as in the case of suicide by the insured while sane, that death at the hands of the law was within the contemplation of the contracting parties. Ritter *v.* Mutual Life Insurance Company of New York, 169 U. S. 139. But if parties make express contracts on the subject could the courts lawfully enforce them? It is the policy of every State or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kinds were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon by the executive. Such contracts would encourage litigation and bring reproach upon the State, its judiciary and executive, and would we think be against public policy and void. The policy of the law often permits and even requires for error a new trial of a

convicted defendant, but never after his execution. The principle that makes void a wagering contract as to a rise or fall in the price of goods in the markets, (Irwin *v.* Williar, 110 U. S. 499) would make void for stronger reasons a contract based on the
32 failure of courts and juries to perform their respective duties.

Now, to apply the reasoning of Lord Lyndhurst in the Fauntleroy case, if a policy with such a form of condition inserted in it in express terms cannot on grounds of public policy be sustained, a policy without such a condition cannot be enforced on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void.

In some cases it has been held that a trial and conviction or acquittal in a criminal case is conclusive as to the facts decided when brought in question by the parties in a subsequent civil suit. Coffey *v.* United States, 116 U. S. 436; Roberts *v.* State of New York, 160 N. Y. 217, 224, and 30 Hun. (N. Y.) 106. But the authorities on this subject are conflicting. 1 Freeman on Judgments (4th ed.) sec. 319 and cases there cited. The assignee takes the policy subject to all defenses and equities which attached to it in the hands of the assignor. Bliss on Life Insurance sec. 331. If the judgment of conviction against Burt is conclusive as to his guilt in this suit by the assignees of the policy, this case would be brought precisely within the principle decided in the Fauntleroy case, for the averment in the petition of the conviction of Burt would avoid the effect of the allegation of his innocence. But we prefer to base our conclusion on the ground that a contract of life insurance, written to insure against a capital conviction in the established courts of competent jurisdiction in the event that such conviction is unjust and unwarranted by the evidence, is void as being against public policy.

The judgment of the circuit court is affirmed.

33 (Filed Dec. 4, 1900.)

S. M. BURT and H. R. BURT, Plaintiffs in Error,
vs.
UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, Defendant in Error. } No. 864.

McCORMICK, circuit judge, dissents.

I cannot concur in the judgment of the court in this case. It seems to me that the case does not call in question in any manner, or come under the authority of, or the reasoning in the case of Amicable Society etc. *vs.* Bolland, 4 Bligh, N. R. 194, 211.

The action might very well have been brought in the common form on the policy of insurance and left it to the defendant to raise by its answer the questions that are herein raised. The plaintiffs being so advised, chose to raise the question as they have done in their petition. The petition implies, if it does not expressly announce, that if the insured was in fact guilty of murder and his death occurred by the execution of the sentence against him for that crime, the proof of such facts would avoid the civil contract on

which this action is brought. The holders of the policy however, expressly allege that the assured did not commit the homocide charged against him, and that if he did commit the homocide he was in such condition of mental disorder as rendered him incapable at that time of committing murder. They allege that these pleas were presented on the trial of the indictment against the assured, and that on that trial, in a court of competent jurisdiction the verdict and judgment were rendered against him and sentence of death pronounced upon him and executed. The demurrer which was sustained in the circuit court must assume either that the death of the assured by a judicial sentence for crime, though in fact he was wholly innocent and merely the victim of mistake or miscarriage of justice, avoids the policy; or that the
34 judgment of conviction in the criminal case is not only admissible to prove both the sanity and the guilt of the accused, but that it is conclusive evidence of both. I fully concur with counsel for the plaintiffs in error that the first question has never been directly heretofore decided. It is certainly not decided in either the Fauntleroy case or the Ritter case. The first of those cases proceeds upon the admission or assumption that the assured was guilty of forgery as charged, and for which he was executed, no question being made as to his mental condition. In the latter case the question of the assured's sanity was submitted to the jury in the civil suit, and on the evidence and under the charge of the court, the jury found against the policy-holder. While the elaborate argument in the opinion of the supreme court announcing the decision of the case does not show that if the insanity of the assured had been shown, his suicide while in that condition would not have avoided the policy, it seems to me to strongly imply that it would not.

It seems to me that the ruling of the circuit court cannot be sustained except upon the second ground indicated above, and that the practical effect of the judgment of this court is to set aside a general rule, which has received immemorial recognition, to the effect that "a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which it was rendered." This is elementary. The reason of the rule, as expressed by Mr. Greenleaf, is "If the defendant was convicted, it may have been upon the evidence of the very plaintiff (or party claiming the benefit) in the civil action; and if he was acquitted it may have been by collusion with the prosecutor. But beside this, and upon more general ground, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same." The judgment of a court of competent jurisdiction being a public transaction rendered by public authority, is presumed to be faithfully recorded. It is therefore the only proper legal evidence of itself, and is conclusive evidence of the fact of the rendition
35 of the judgment and of all the legal consequences resulting from that fact, whoever may be parties to the suit in

which it is offered in evidence. Thus, if one indicted for an assault and battery has been acquitted and sues for malicious prosecution, the record of acquittal is evidence for the plaintiff to establish that fact, notwithstanding the parties are not the same; but if he were convicted of the offence, and then is sued in trespass for the assault, the record in the former case would not be evidence to establish the fact of the assault, for, as to matters involved in the issue, it is *res inter alios acta*." 1 Greenleaf's Evidence, sec. 537, 538.

I am unable to see why public policy not only does not forbid, but seems to require the courts of public justice, at the suit of proper parties, to make new inquiry as to the guilt of one who had been criminally charged and convicted of making an assault, should forbid the making of the inquiry sought to be made in this case as to the real guilt of the assured in the matter for which he was charged, tried and executed. It seems to me that the public interest and a sound public policy give stronger support to the general rule in a case like the present than in a suit for damages by one claiming to have been assaulted by a defendant who had been convicted therefor in a criminal prosecution. In the case of Coffey *vs.* United States 116 U. S. 436, the parties to the civil suit were the same as the parties in the criminal action; the subject-matter was the same; the civil suit, if we may call it so, being for the recovery of a part of the punishment denounced by the penal statute against a crime charged in the criminal action. In that case the court say: "In both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other. The judgment of acquittal in the crimina. proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the
36 claimant, in the criminal proceeding so that the facts cannot be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In the case of Roberts *vs.* State, 160 N. Y. 217, the parties in the civil action were the State of New York and the claimant being the same as the parties in the criminal action. And it is not held, as I read the decision, that the judgment of conviction in the criminal action was conclusive as to the fact of the guilt of the accused. On the contrary, the opinion asserts: "It was therefore incumbent upon him, the claimant, to establish that he was improperly convicted and imprisoned, and the amount of damages he had sustained by reason thereof. While a great volume of evidence was given upon the second question (the amount of damages), we find nothing in the record which justified the board in finding that his conviction and imprisonment were improper, but instead, the evidence upon which he was convicted and the judgment of conviction were introduced, both of which show that his conviction was proper; the former presumptively and the latter conclusively." By this last word "conclusively" the court could not have meant that no other

evidence on that subject should have been received, because if that had been their meaning, they would at once have held that the act of the legislature which authorized the proceeding was a void act, for this act recited upon its face that the claimant had been convicted and imprisoned for the alleged crime of burglary, and no question appears to have been made either in the act or before the board of claims that the conviction was not had in a court of competent jurisdiction.

37 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 37 pages, numbered from *a* to 36, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court, and dissenting of McCormick, J., in the case of S. M. and H. R. Burt *vs.* Union Central Life Insurance Company, No. 864, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 2nd day of February, A. D. 1901.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] File No. 18,095. U. S. C. C. of appeals, 5th circuit. Term No. 282. S. M. Burt and H. R. Burt, petitioners, *vs.* The Union Central Life Insurance Company. Filed April 1, 1901.

38 In the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans.

S. M. and H. R. BURT, Plaintiffs in Error,
vs.
UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, OHIO, Defendant in Error. } No. 864.

In the above-styled cause it is agreed hereby, by and between plaintiffs and defendant in error, acting by their respective counsel, that whereas the Supreme Court of the United States has granted in said cause a writ of certiorari to review the proceedings and judgment of said circuit court of appeals therein, and required said last-named court to send to said Supreme Court the record and proceedings of said circuit court of appeals in said cause the clerk of said circuit court of appeals may make return to said writ of certiorari by transmitting to said Supreme Court of the United States a certified copy of this agreement, in lieu of said record, or a certified copy thereof, it being hereby expressly agreed that the certified copy of

the entire record of said court in said circuit court of appeals already on file in said Supreme Court (having been filed with the petition for said writ of certiorari) in said cause, which in said Supreme Court is No. 610, and entitled S. M. Burt and H. R. Burt petitioners *vs.* The Union Central Life Insurance Company of Cincinnati, Ohio, respondent, shall be used, taken and considered in all things, and to all intents and purposes as the record required by said writ to be sent up to said Supreme Court by said circuit court of appeals.

Witness *out* hands this 25th day of April, A. D. 1901.

S. M. BURT AND
H. R. BURT, *Plaintiffs in Error.*
By GARDNER RUGGLES,
Their Counsel.
THE UNION CENTRAL LIFE
INSURANCE COMPANY,
Defendant in Error.
By ROBERT RAMSEY, *Its Counsel.*

Endorsed: Filed May 4th, 1901. J. M. McKee, clerk.

39 I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth judicial circuit do hereby certify that the foregoing one page contains a true full and perfect transcript of the agreement as to return to writ of certiorari filed May 4, 1901, in the case of S. M. Burt, and H. R. Burt, *vs.* Union Central Life Insurance Company, No. 864 as fully and completely as the same now remains of record and on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, in the city of New Orleans, on this 4th day of May, A. D. 1901.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which S. M. Burt and H. R. Burt are plaintiffs in error and The Union Central Life Insurance Company is defendant in error which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the western district of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed
41 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme

Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of April, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

42 UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The within writ of certiorari received this May 4, 1901, and for return thereto, I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit do annex hereto, and make a part hereof a true and correct copy of the stipulation of counsel filed in the within-named cause on the 4th day of May, 1901.

And I do certify that the transcript of the record now on file in the Supreme Court of the United States in the cause mentioned in this writ is a true full and perfect transcript of the record and all proceedings had in said cause in the United States circuit court of appeals for the fifth circuit.

Given under my hand and the seal of said court, this May 4th, A. D. 1901.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] File No. 18095 Supreme Court of the United States. No. 282, October term, 1901. S. M. Burt and H. R. Burt *vs.* The Union Central Life Insurance Co. Writ of certiorari and return. Filed May 10, 1901.

No. 2182

Office Supreme Court U.S.
FILED
APR 1 1901
Clerk.

Appeals

No. 864—Notice.

In the United States Circuit Court of Appeals.

For the Fifth Circuit.

November Term, A. D. 1900.

S. M. AND H. R. BURT

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, OHIO.

Notice is hereby given that upon the verified petition of the plaintiffs in error in the above styled cause, S. M. and H. R. Burt, and upon all the pleadings and proceedings herein, I will, on Monday, the 25th day of March, A. D. 1901, at the opening of the court on that day, or, as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States, at the capitol in the City of Washington, D. C.

Of Counsel for S. M. and H. R. Burt.

Service of the foregoing notice and motion is hereby accepted this ..... day of March, A. D. 1901.

In the Supreme Court of the United States.

October Term, A. D. 1900.

EX-PARTE S. M. AND H. R. BURT—Motion.

To the Honorable the Supreme Court of the United States:

And now come S. M. and H. R. Burt, by ..... their counsel, and move this honorable court that it shall, by certiorari, or other proper process, directed to the honorable the judges of the United States Circuit Court of Appeals for the Fifth Circuit, require said court to certify to this court, for its review and determination, a certain cause in said Court of Appeals lately pending, wherein the said S. M. and H. R. Burt were plaintiffs in error and the Union Central Life Insurance Company of Cincinnati, Ohio, was defendant in error, and, to that end, now tender herewith their petition, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

Counsel for S. M. and H. R. Burt.

Office Supreme Court U. S.
FILED
APR 1 1901
JAMES H. McKENNEY,
Clerk.

No. 940

In the Supreme Court of the United States.

[redacted]

Petitioner,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, OHIO,

Respondent.

Petition for Writ of Certiorari.

In the Supreme Court of the United States.

October Term, A. D. 1900.

S. M. AND H. R. BURT, Petitioners,

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, OHIO, Respondent.

Petition for a writ of certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its revision and determination, the writ of error taken by S. M. and H. R. Burt v. The Union Central Life Insurance Company of Cincinnati, Ohio.

To the Honorable the Supreme Court of the United States:

The petition of S. M. Burt and H. R. Burt respectfully shows unto this honorable court as follows:

First—That your petitioners are both resident citizens of the county of Travis, in the State of Texas, while respondant is a private corporation, duly incorporated under the laws of the State of Ohio, and a non-resident of the State of Texas, being a resident and citizen of the State of Ohio.

Second—That, on the 1st day of August, A. D. 1894, the respondent, The Union Central Life Insurance Company of Cincinnati, Ohio, for a valuable consideration, made, executed, and delivered to one William E. Burt, of said Travis county, Texas, a certain contract or Policy of Life Insurance (a substantial copy whereof, with its conditions and provisos, is hereunto annexed, marked Exhibit A, and prayed to be taken and considered as part hereof) whereby, in consideration of the annual payment to said company of the sum of one hundred and fourteen dollars and seventy cents, at the company's home office, in Cincinnati, Ohio, on or before the 30th day of July, at noon, in every year during the term of twenty years from date of said policy, and, of the payment when due of any and all notes given for premiums, or parts of same (unless, of course, said term ceased by the death of said

William E. Burt) said company bound itself to pay to Anna M. Burt, the wife of said William E. Burt, if living; otherwise to his executors, administrators or assigns, the sum of five thousand dollars, within sixty days after the receipt by said company of notice and satisfactory proof of death of said William E. Burt.

Third—That, thereafter, towit: on or about the 10th day of September, A. D. 1895, the said named beneficiary, Anna M. Burt, joined by her said husband, William E. Burt, for a valuable consideration, made, executed, and delivered to petitioners, who then were, and still are, creditors of said William E. Burt, and Anna M. Burt, and both brothers of said William E. Burt, a written conveyance or transfer, whereby said William E. and Anna M. Burt assigned and conveyed to petitioners a one-half interest in said policy and the proceeds thereof, in virtue of which conveyance, petitioners then became, and still are, the owners of, and entitled to, the said one-half share in said policy.

Fourth—That, thereafter, towit: on or about the 24th day of July, A. D. 1896, said William E. Burt, being then still alive, his said wife and beneficiary in said policy, said Anna M. Burt, died intestate, as did also, on the same day, her and said William E. Burt's two minor female children (said two children being both intestate, unmarried, and without issue or descendants) and said two children being the only issue or descendants of the marriage of said William E. Burt and Anna M. Burt, or either of them.

Fifth—That, thereafter, towit: on or about the 4th day of February, A. D. 1897, said William E. Burt, being then the sole owner and successor to all the rights and interest of said Anna M. Burt, as her sole heir, in and under said Policy of Insurance, for a valuable consideration, made, executed, and delivered to petitioners his written transfer and conveyance, conveying and assigning to them said policy, together with all and singular, his right, title, and interest therein, and authorizing them to receive and collect same when due and payable, whereby petitioners became, and now are, the sole owners of the remaining one-half interest in said policy.

Sixth—That whatever the effect of said two instruments of assignment, or either of them, petitioners, nevertheless became, on the death of said William E. Burt, as hereinafter stated, and still are, the sole owners of and entitled to said policy, the amount

agreed thereby to be paid and any proceeds thereof, because, when said William E. Burt died, he was intestate, unmarried, and without issue or descendants, and left surviving him neither father, mother, grand parent, nor brother or sister (or their descendants) other than petitioners, who are his brothers, as aforesaid; and are and were his only heirs at law. And so, there having been no administration (nor necessity therefor) on his estate, petitioners, as such heirs, became, and still are, the legal owners and holders of said policy, and entitled to the full amount agreed thereby to be paid, on, and in event of, the said William E. Burt's death, towit: Five thousand dollars, according to the legal tenor and effect of said policy.

Seventh—That, thereafter, towit: on or about the 27th day of November, A. D. 1896, said insured, William E. Burt, was indicted, under the alias of Eugene Burt, for the murder of his said wife, Anna M. Burt, in the District Court of Travis County, Texas, Twenty-sixth Judicial District, a court of competent jurisdiction to hear and determine such offenses. That he was, upon said indictment, afterwards, in said court tried and convicted of the offense of murder in the first degree, as in said indictment charged, and his punishment fixed at death, notwithstanding that the defense, amongst others, of his insanity was interposed and put in issue on his trial. That, thereafter, on or about April 26, 1898, pursuant to said conviction, said William E. Burt was, by a judgment and sentence of said court, sentenced to be hanged, and that, subsequently, on the 27th day of May, A. D. 1898, pursuant to said judgment and sentence, and in virtue of a death warrant issued out of said court thereunder, said William E. Burt was executed by the sheriff of Travis county, Texas, the officer appointed by law to execute the sentences of said court, by being by said sheriff, on that day, hanged by the neck until dead, so departing this life.

Eighth—That, notwithstanding his said conviction, sentence, and execution, said William E. Burt did not, in fact, commit the said offense charged against him, as petitioners verily believe, nor in fact kill, or bring about or participate in the death of, his wife, the said Anna M. Burt, nor was he guilty of said crime. But that, even if he participated in the murder of his wife, or even actually killed her, yet such participation, nay, even murderous act, on his part, if any there was, violated no condition or obligation,

either express or implied, in anywise incumbent on him under said policy, nor did it, or could it, avoid either said policy, or his agreement or contract of insurance thereunder, nor forfeit any right of either of said William E. Burt, or petitioners, thereunder, because, at the time of the aforesaid death of said Anna M. Burt, said William E. Burt, although of sound physical health, had become and was wholly insane, and totally irresponsible for and unconscious of his acts, as petitioners verily believe.

Ninth—That, at the time of said death of said William E. Burt, said policy of insurance was a valid, binding and subsisting contract, in full force and effect, the first and second annual premium payments due thereon on, respectively, July 30th, 1895, and July 30th, 1896, having been, as petitioners are advised and believe, fully paid to, and received, accepted, and receipted for by said company, the fact as to the only other premium falling due or becoming payable during the lifetime of said William E. Burt (same being, as were also each of the other premiums paid, the sum of one hundred and fourteen dollars and seventy cents), being that it was, on the day it became due, towit: July 30, 1897, within the hours prescribed by said policy, duly and legally tendered and offered to said company, at its said home office, but was by it refused, said company, however, being notified that said tender would be kept good, as has been done. And petitioners say, that thereby said company has waived actual payment of said premium.

Tenth—That, heretofore, towit: on or about the 28 day of June, A. D. 1898, petitioners, being the sole legal owners and holders of said policy of insurance, and entitled to payment of said sum of five thousand dollars, thereby agreed to be paid by said company, on the death of said William E. Burt, within sixty days after receipt by said company of notice and satisfactory proof of his death, did present to said company, and it received, such due notice and satisfactory proof, as required by said policy, and did make due demand of said company for payment of said sum to them.

Eleventh—That, by reason of the said death of said William E. Burt, said sum of five thousand dollars agreed by said company in said policy to be paid, became due, and the said period of sixty days after receipt by said company of due notice and satisfactory proof of his death having expired prior thereto, said sum became

and was payable to petitioners by said company, on or about the 28th day of August, A. D. 1898, and was long past due prior to the date of institution of this suit, notwithstanding which, said company wholly refused and still refuses, payment of same, or any part thereof.

Twelfth—That by reason of these facts and because said company, being a life insurance company and liable therefor, failed, within the sixty days specified in said policy, and after due demand made therefor, to pay said sum of five thousand dollars in said policy agreed to be paid, said company thereupon became, and still is, liable and bound to pay to petitioners, as owners and holders of said policy, in addition to the said specified amount thereof, the further sum of twelve per cent of said amount, or six hundred dollars, as damages, and also further all their reasonable attorney's fees, incurred or expended in and about prosecution of suit for the collection of said sums, and they say that, because of the failure and refusal of said company to pay said policy, they were compelled to institute suit to collect said sums, and to employ the services of attorneys and counsel at law therein and pay their fees, and that reasonable fees for such attorneys therein will amount to twenty-five hundred dollars.

Thirteenth—That, thereafter, said company still refusing to pay said policy or any part thereof, petitioners instituted this suit thereon, originally in the District Court of Travis County, Texas, Fifty-third Judicial District, on the 26th day of October, A. D. 1898, but the same was thereafter removed by said company to the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit, on solely the ground of diversity of citizenship between petitioners, plaintiffs in said suit, and said company, defendant therein, giving said Circuit Court jurisdiction of the cause.

Fourteenth—That, thereafter, on the 16th day of December, A. D. 1898, said company filed a copy of the record and proceedings of said State court in said Circuit Court of the United States, as required by law, whereupon, on July 7th, A. D. 1899, petitioners, under leave of said Circuit Court, filed their first amended original petition, against said company, alleging, in substance, the facts hereinbefore recited, and praying judgment against said company for the amount of said policy—five thousand dollars—twelve per cent damages thereon, or six hundred dollars addi-

tional, and their reasonable attorney's and counsel fees, alleged to be twenty-five hundred dollars.

Fifteenth—That, thereafter, on said July 7th, 1899, said company, defendant in said cause, filed in said Circuit Court its amended original answer, setting up, amongst other grounds of defense (which it will be unnecessary to notice, because the cause went off on demurrer and exceptions, (1) a general demurrer, (2) a special exception to the effect that petitioners' said amended original petition stated no cause of action against defendant, because it affirmatively appeared therefrom that the assured died at the hands of the law, under judgment of a court of competent juridiction, and (3) a special exception that so much of petitioners' said petition as sought to recover twelve per cent damages and reasonable attorney's fees, stated no cause of action against defendant, because the law of the State of Texas, under which said claims were asserted, viz: article 3071 of the Revised Statutes of the State of Texas, was void as in contravention of the fourteenth amendment to the Constitution of the United States.

Sixteenth—That, thereafter, on the 10th day of July, A. D. 1899, the said Circuit Court having, heard argument of counsel on said demurrer and exceptions, rendered judgment in favor of said company, defendant, and against petitioners, plaintiffs in said cause, sustaining said general demurrer and both special exceptions and adjudging that petitioners take nothing by their suit, and that, they declining to amend, the same be dismissed, and that defendant go thence without day and recover of petitioners his costs. To all of which petitioners then and there duly excepted.

Seventeenth—That, in support of said demurrer and exceptions it was argued and claimed, on the part of said company:

(a) That the judgment and sentence in the District Court of Travis County, Texas, against assured, William E. Burt, in the murder case, was conclusive of his guilt as against the beneficiaries in his life insurance policy in this case.

(b) That, if the policy had contained an expressed condition that payment should be made by the company, notwithstanding the death of assured at the hands of the law, provided he was in fact innocent of the crime for which he was convicted and executed, or, insane and wholly irresposible at the time of its commission, if he did commit it, such condition would be void as

being against public policy, and that, therefore, the policy being silent on the subject, if he were convicted of the crime, as he was, and executed for it, his beneficiaries could not recover on his policy of life insurance, notwithstanding his actual innocence of the crime for which he suffered, or his actual incapacity to commit it.

(c) That, if the beneficiaries are suffered to recover on the policy, they were, nevertheless, not entitled to recover their damages and attorney's fees, pursuant to the Texas Statute, because this statute contravened the fourteenth amendment to the Constitution of the United States, in that it singled out and imposed another and different burden in the nature of a penalty, on one class of debtors, viz: life and health insurance companies, for nonpayment of their contractual obligations, from that required of other debtors, and, being class legislation, was therefore void.

This last argument became material only in event that it should be held that the company was liable on its original undertaking.

Eighteenth—That, on the other hand, it was argued and contended by petitioners that, notwithstanding the fact that assured died at the hands of the law as a result of his having been indicted, tried, convicted, and sentenced to death for murder, in and by a court of competent juridiction, of such offense, and the execution of such sentence, nevertheless, if insured did not in fact commit, cause or participate in, the murder for which he was so sentenced and suffered, but was wholly innocent thereof, or was, at the time of its commission, even if he in fact committed the act, insane, unconscious of the nature of his act, and wholly irresponsible, petitioners were entitled to recover upon the policy of insurance on his life, although assured's insanity had already been in issue and passed on adversely to him in said criminal proceeding, because,

(a) The only implied understanding, or agreement, between assured and the company (the policy being silent as to the death of assured at the hands of the law) was that assured should not intentionally, or voluntarily, while of sound mind, vary the risk insured against by commission of crime, liable to effect his death.

(b) Although assured died at the hands of the law, nevertheless if in fact he was innocent of the act for which he suffered, there was no such voluntary or intentional variation of the risk on his

part, or violation of any of his covenants or agreements, express or implied.

(c) Although assured died at the hands of the law, and actually killed his wife (the act for which he suffered), yet, if he was, in fact, insane and wholly irresponsible for his acts, at the time he killed her, there was still no such voluntary or intentional variation of the risk, or violation of the contract, on his part, as avoided or forfeited the policy of insurance, and his situation was the same as if in fact he had been wholly innocent of the act.

(d) The judgment and sentence of death of the criminal court against assured (for, amongst other reasons, want of mutuality as being res inter alios acta), and his execution pursuant thereto, were inadmissable in evidence in this suit, except for the fact that they were pleaded by petitioners, and being only so admissible, were evidence merely of the facts of the rendition of the judgment and the execution of the sentence; were not evidence of any facts on which such judgment was based; were immaterial and irrelevant as to any issue herein, and, at most, were only prima facie, and in no manner conclusive of petitioners' right to recover on the policy.

(e) The fact that assured's insanity was in issue and passed on adversely to him in the criminal case was wholly immaterial, in any point of view, in this case.

Nineteenth—That by its said judgment of July 10, 1899, sustaining said company's general demurrer and first exception said Circuit Court in effect held and decided that since it appeared from petitioners' amended petition that said assured William E. Burt was indicted, tried, convicted, and sentenced to death in a court of competent jurisdiction for the offense of murder in the first degree, and was executed pursuant to such sentence, although it likewise appeared that, notwithstanding such sentence and execution, said assured was innocent of the crime for which he suffered, either because he did not participate in it, or because at the time of its commission he was insane and wholly unconscious of and irresponsible for his acts, nevertheless assured's insanity having been, amongst other things, in issue as a defense in said criminal cause, such conviction, sentence, and execution were conclusive as against petitioners' right to recover on the policy of insurance on assured's life in controversy. In other words, that, assured having a policy of insurance on his life, and being convicted of and executed for a crime which he did not commit,

the mere fact of such conviction and execution ipso facto and instantly avoided the policy, and the judgment and sentence were not merely evidence of their own rendition, but also evidence and conclusive evidence herein of the facts upon which they were rendered.

Also that in sustaining said company's second exception, said Circuit Court in effect held and decided that the Statute of Texas, towit: article 3071, title LVIII, chapter 3, of the Revised Civil Statutes of Texas (1895), which provides that "in all cases where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss," is violative and in contravention of the fourteenth amendment to the Constitution of the United States.

This quesion could, of course, only have become material in event recovery on the policy had been allowed, and it followed from failure to recover on the policy alone that judgment should have gone against petitioners on this demand, too, as a matter of course. But the Circuit Court sustained the exception on this point, and thereby, in effect, held and decided as above stated.

It was argued in support of this exception that, this court (in Gulf, Colorado and Santa Fe Railway Company v. Ellis, 165 U. S., 150) held unconstitutional and void, as in contravention of said amendment, the act of the Legislature of Texas of April 5, 1889, (Sayles' Texas Civil Statutes, Supplement, p. 768, article 4220a) which, in substance, provided that "any person in the State of Texas having a valid bona fide claim for personal services rendered, or labor done, or for damages, or for over charges on freight, or claims for stock killed or injured by the trains of any railway company, provided that such claim for stock killed or injured should be presented to the agent of the company nearest to the point of such killing or injury, against any railway corporation operating a railroad in this State, such claim, not exceeding $50, might present his claim, verified by his affidavit, for payment to such corporation, and, if same should not be paid within thirty

days after such presentation, might institute suit thereon in the proper court, and, if he finally established his claim, and obtained judgment for its full amount, should be entitled to recover, in addition to it and costs, also all reasonable attorney's fees, provided he had an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the same, and that, the same principle applying in this case as in that, the statute in controversy must be likewise void.

As against this contention, petitioners argued and claimed that the Supreme Court of Texas, in Union Central Life Insurance Company v. Chowning, 86 Texas, 654, decided before, and in The Fidelity and Casualty Company of New York v. Allibone, 90 Texas, 660, decided since, the Ellis case, had held this identical statute not obnoxious to said amendment. Also that in the Ellis case itself, this court had held that classification, if based on some reasonable ground—some difference, bearing a just and proper relation to the attempted classification—and not being a mere arbitrary selection of one class of debtors for imposition of additional penalties for non-payment without suit, would not render the statute effecting it obnoxious to the equality clause of the said amendment.

Also that this court, in St. Louis, Iron Mountain and Southern Railway Company v. Paul, 173 U. S., 404, had held that the Arkansas act of 1889, requiring railroad companies to pay their employes when discharged their unpaid wages then earned, without deduction, or that such wages should continue, at the same rate, until paid, not to exceed sixty days, was not violative of said amendment, and did not deny such companies the equal protection of the laws.

Finally that this court, in Atchison, Topeka and Santa Fe Railroad Company v. Matthews, 174 U. S., 96, had held that the Kansas statute, providing that in an action against a railroad company for damages by fire caused by operating the railroad, the plaintiff need only establish the fact that the fire complained of was caused by operating the railroad and the amount of his damages, and that such proof should be prima facie evidence of negligence on the part of the railroad, and that the plaintiff, if he recovered, should also be allowed a reasonable attorney's fee, was not in conflict with the fourteenth amendment to the Constitution of the United States, as denying the equal protection of the laws to

such company, and was valid, the court observing that the equal protection of the laws guaranteed by said amendment does not forbid classification, nor does the fact of inequality produced by classification determine the unconstitutionality of the statute.

Twentieth—That to the said judgment and decree of the said Circuit Court petitioners duly excepted and prayed and were granted on July 10, A. D. 1899, a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, assigning errors as follows:

1. That the honorable the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Judicial Circuit, erred in sustaining the demurrer interposed by the defendant to the first amended original petition of plaintiffs, filed in said cause on the 7th day of July, A. D. 1899, and by holding and deciding that the facts stated in the said amended original petition are not sufficient to constitute or show a cause of action in said plaintiff's favor against said defendant.

2. That said Circuit Court erred in sustaining the first ground of demurrer interposed by defendant to the first amended original petition of plaintiffs, filed July 7, A. D. 1899, and by holding, deciding and adjudging that said amended original petition does not state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant, because it appears from said petition that William E. Burt, the assured in the policy of life insurance sued on, was indicted, tried, convicted, and sentenced to death in a court of competent jurisdiction, of the offense of murder in the first degree, and was executed in pursuance of such sentence, although it was also alleged in said petition that, notwithstanding such sentence and execution, said insured did not, in fact, commit, cause, or participate in said murder, but was, at the time of its commission, and whether he committed or participated in it, or not, insane, unconscious of the nature of his actions, if any, and wholly irresponsible therefor, said Circuit Court holding and deciding that the defense, amongst others, of insured's insanity having been in issue in said criminal cause, said conviction, sentence, and execution of insured were conclusive as against plaintiffs' right to recover on the policy of insurance on his life in controversy herein, whether insured in fact committed, caused or participated in said crime, or not, and whether he was insane or not when it was committed.

3. That said Circuit Court erred in sustaining the second ground of demurrer and special exception interposed by defendant to plaintiffs' said amended original petition, filed, as aforesaid, in said cause, and by holding, deciding and adjudging that said amended original petition, in so far as it seeks a recovery by plaintiffs, against defendant, of the sum of twelve per cent on the amount of the policy of life insurance sued on, as damages, and a recovery of attorney's fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant, in that behalf, because the statute or law of the State of Texas, to-wit: article 3071 of the Revised Civil Statutes of the State of Texas, under and in virtue of which said two claims are asserted, is violative and in contravention of the fourteenth amendment to the Constitution of the United States.

4. That said Circuit Court erred in rendering judgment against plaintiffs in said cause, sustaining said demurrer and exceptions, and dismissing plaintiffs' suit upon the pleadings in said cause, and that said judgment is contrary to law and the facts as stated in said pleadings in said cause.

Wherefore the said plaintiffs pray that the said judgment of said Circuit Court be reversed, and such directions be given that full force and efficiency may inure to plaintiffs by reason of the aforesaid causes of action set forth and alleged in their said amended original petition filed in said cause.

Twenty-first—That, thereafter, on the 4th day of August, A. D. 1899, a certified transcript (agreed on by counsel for both parties, Trans., pp. 20-21) of the record and of all proceedings of the said Circuit Court in the said cause, was filed in the United States Circuit Court of Appeals for the Fifth Circuit, and the said cause was entered and docketed in the said Circuit Court of Appeals and entitled S. M. and H. R. Burt, plaintiffs in error, v. The Union Central Life Insurance Company of Cincinnati, Ohio, defendant in error—No. 864.

Twenty-second—That the said cause came on to be heard, on said writ of error, in the said Circuit Court of Appeals, at the November term thereof, A. D. 1899, on the 23rd day of April, A. D. 1900, before the Honorable Don A. Pardee (presiding judge), and the Honorable A. P. McCormick and the Honorable David D. Shelby, all three Circuit Judges of the United States

for the Fifth Judicial Circuit, composing said Circuit Court of Appeals, and was then duly submitted to and taken under advisement by said court on the transcript of the record and proceedings therein of said Circuit Court and the printed briefs and arguments of counsel for both parties. And that, thereafter (said cause having been held by the court under advisement until then), on the 4th day of December, A. D. 1900 (at the November term of said court A. D., 1900), said Circuit Court of Appeals rendered a judgment in all things affirming the said judgment of the said Circuit Court, as follows:

S. M. and H. R. Burt
v. No. 864.
The Union Central Life Insurance Company.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Texas and was argued by counsel.

In consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is, hereby affirmed.

It is further ordered and adjudged that the plaintiffs in error, S. M. Burt and H. R. Burt, and the sureties on the writ of error bond herein, George W. Littlefield and Wm. R. Hamby, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

Twenty-third—That thereafter, towit: on the 24th day of December, A. D. 1900, petitioners, by their counsel, filed in, and presented to, said Circuit Court of Appeals their petition for rehearing of said case by said court, which petition was as follows, towit:

No. 864.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

November Term, 1900.

S. M. and H. R. BURT, Plaintiffs in Error,

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, OHIO, Defendant in Error.

PETITION FOR REHEARING BY PLAINTIFFS IN ERROR.

To the Honorable, the United States Circuit Court of Appeals, for the Fifth Circuit:

Your petitioners, plaintiffs is error in the above numbered and entitled cause, having carefully examined the opinion therein of this Honorable Court, think, and respectfully submit, that, with propriety, they may ask the court to consider whether this case is not one in which it will be proper to grant a rehearing to plaintiffs in error, on the following grounds, on which it is respectfully submitted that this court was in error in said opinion, towit:

First—That, while a contract of life insurance in terms payable, notwithstanding the death of the assured at the hands of the law, as the result of capital conviction in the established courts of competent jurisdiction, in event such conviction should be unjust or unwarranted by the evidence, might and probably would be void, as being against public policy, the mere fact of the death of assured at the hands of the law as the result of such capital conviction, if he were in fact innocent (that is, either did not commit the crime or was insane when it was committed), would not avoid a contract of insurance otherwise valid.

Second—That the judgment and sentence to death of assured in a court of competent juidiction was admissible only because pleaded by plaintiffs in error, and even then could only establish the fact of its own rendition, and was neither admissible nor conclusive to establish the facts on which it was rendered, nor any of such facts, nor was it an adjudication of such matters as to be within any of the rules relating to res adjudicata.

Third—That liability of defendant in error on the policy of life insurance in controversy, same being originally a valid contract, could only be avoided by some subsequent act of the assured operating a forfeiture, and to effect such forfeiture assured must either have done some act expressly or impliedly forbidden, or omitted some duty expressly or impliedly required, by the contract. There is no omission of duty involved, and his sentence and death at the hands of the law furnished no such act, if in fact he was either innocent or insane at the time of the commission of the act for which he was convicted and executed.

Finally, plaintiffs in error respectfully suggest that this court again consider the points taken in their brief filed herein to the effect that, the policy of insurance in controversy being silent thereon, the death of the assured, William E. Burt, at the hands of the law as the result of the judgment and sentence of death pronounced upon him by the District Court of Travis County, Texas, did not

and could not preclude a recovery on said policy by plaintiffs in error, if in fact said Burt was either innocent of the crime for which he was convicted or insane at the time of its commission, if he did actually commit it.

Wherefore, upon the foregoing grounds, these plaintiffs in error respectfully pray this Honorable Court to grant them a rehearing of said case.

GARDNER RUGGLES.

Attorney and Counsel for Plaintiffs in Error, S. M. and H. R. Burt.

Burt.

I, Gardner Ruggles, attorney and counsel for the plaintiffs in error herein, S. M. and H. R. Burt, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

GARDNER RUGGLES.

Austin, Texas, December 21, 1900.

Twenty-fourth—That, thereafter, towit: on the 15th day of January, A. D. 1901 (and at said November term, A. D. 1900), the said Circuit Court of Appeals rendered a judgment, denying said petition for rehearing, as follows:

S. M. and H. R. Burt

v. No. 864.

Union Central Life Insurance Company.

Ordered, that the petition for rehearing, filed in this cause, be, and the same is, hereby denied.

Twenty-fifth—That a certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as part of this application in conformity with the 37th rule of this Honorable Court relative to cases from the Circuit Courts of Appeals, and the same is hereunto annexed and marked Exhibit B.

Twenty-sixth—That your petitioners are advised and believe that the said judgment of the said United States Circuit Court of Appeals in the said case is erroneous, and that the said judgment of the said Circuit Court of Appeals being, under the act of Congress hereinafter referred to, a final judgment therein, because its jurisdiction of the cause depended entirely (as did that of the said Circuit Court of the United States for the Western District of Texas) upon the fact that petitioners and said defendant company were and are citizens of different States, this Honorable

Court should require the said case to be certified to it for its review and determination, under and in conformity with the provisions of the sixth section of the act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891.

Twenty-seventh—That, the case having gone off on the demurrer and exceptions interposed to petitioners' amended original petition by defendant, the facts stated in said petition were admitted to be true, and, whereas it was expressly averred in said petition that, notwithstanding his indictment, trial, conviction and sentence for murder in the first degree, for killing his wife, Assured, William E. Pratt, did not in fact commit said offense, nor in fact kill his wife, or cause or bring about her death, or participate therein, and that he was not guilty of said crime. But, that, if he did cause or bring about her death or participate therein, nay, if he actually killed her, he was still not guilty of said offense, because he was, at the time of the commission of the act, insane, wholly unconscious of his acts or their consequences and wholly irresponsible therefor; and, whereas, further, it was averred that the defendant company being liable to pay the loss on the policy of life insurance in controversy, and having failed within the time specified in the policy and after demand made therefor to pay such loss thereby became bound to pay to petitioners, in addition to the amount of the policy, the further sum of twelve per cent on the amount of the policy as damages, and all their reasonable attorney's fees for the prosecution of this suit for the collection of the policy, because it was and is a life or health insurance company within the meaning and intent of the Statute of the State of Texas, in that behalf, towit: Article 3071, of Title LVIII, Chapter 3, of the Revised Civil Statutes of the State of Texas.

It follows that the two questions thus presented by the record are, restated:

I. Whether the indictment, trial, conviction, and sentence for a capital crime in a court of competent juridiction, and the execution pursuant thereto, of an innocent person who has a policy of insurance on his life, silent as to his death at the hands of the law, will preclude any recovery by the beneficiaries on the policy—and, if such recovery may be had, then

II. Whether the law of the State of Texas (which has been heretofore set out in extenso in paragraph nineteenth hereof and need not therefore be repeated) viz: Article 3071, Title LVIII, Chapter 3, Revised Civil Statutes of Texas, is void as violative of the equality clause of the fourteenth amendment of the Constitution of the United States.

Twenty-eighth—That these are both questions of the greatest gravity and importance is evident, without argument, and petitioners respectfully submit that they should both be authoritatively and finally adjudged by this Honorable Court.

It has not infrequently happened heretofore, and will in all probability often happen again, that innocent persons, or insane persons, have been sentenced to death by the courts and executed and to hold, as is the effect of the decision of the Circuit Court of Appeals in this case, that if such persons have life insurance policies, on which they may have paid large sums in premiums for years, the mere fact of such sentence and death is conclusive as against any right of recovery on the policies by the beneficiaries, would be to impose a double punishment; to deprive the families of such unfortunates of a provision—often times the only provision—left for them, and that without any fault on either their or the assured's part, but merely as the result of mistake or miscarriage of justice; to effect, indirectly, indeed, but none the less certainly, a quasi forfeiture and corruption of blood, a thing even in case of just conviction, directly or impliedly, denounced by all our Constitutions, both Federal and State.

The Circuit Court of Appeals hardly seriously intended, nay we may say, in view of its own decision in the case of The Merchants' Life Association of the United States v. Yoakum, 98 Federal Reporter, 251, in which it directly decided Article 3071, Title LVIII, Chapter 3, Revised Civil Statutes of Texas to be constitutional (this case having been decided November 21, 1899), did not really intend to decide that said statute is obnoxious to the equality clause of the fourteenth amendment to the Constitution, and indeed did not discuss that question at all in its opinion, because, perhaps, recovery on the policy being wholly denied, a decision on that point was unnecessary. But the Circuit Court did directly decide the statute to be repugnant to said amendment and therefore void, and the effect of the affirmance in all things of that judgment by said Circuit Court of Appeals would, of

course, be that the latter court likewise decided it to be so. At any rate, it gives this Honorable Court occasion authoritatively and finally to decide that question also, in event it shall reverse the decision of the Circuit Court of Appeals on the general demurrer and first exception, and thereby, in event of another trial below, save the delay, labor, and expense of a writ of error or another application for certiorari to decide this vexed question. The volume of life insurance in Texas is very great, as is perhaps judicially known to this court through the multitude of suits involving life insurance policies in the Federal Courts of the State alone, and in every case this claim for damages and attorney's fees is made, and as regularly met by the same objection to the constitutionality of the statute authorizing it. If this court should finally hold the act to be constitutional, much needless litigation over policies of life insurance would be avoided, because, as the case stands now, the company is generally a wealthy corporation, with counsel regularly employed, so that litigation costs it comparatively little or nothing, while the beneficiary is poor, unable usually to employ counsel except on contingent fee, and can only look forward, even if finally successful, to a very small nett result, a state of affairs that very naturally leads to refusal to pay, on the part of the company, in many cases on the flimsiest grounds. If, however, the company were assured that, unless its refusal to pay were based upon some valid legal excuse, it would, in addition to the face of the policy, have to pay also twelve per cent thereon as damages as well as the reasonable attorney's fees of its opponent, such refusals would be very infrequent.

Twenty-ninth—That substantially the same arguments were used on the part of both petitioners and said company in said Circuit Court of Appeals as were made in said Circuit Court, as will more fully appear from a copy of petitioners' brief filed in said Circuit Court of Appeals, which is filed, under submission, herewith, and referred to in support of this petition.

Thirtieth—That the said case was decided in the said Circuit Court of Appeals, as well as in the Circuit Court, on the point involving assured's conviction and execution, on the supposed authority, or rather on what petitioners respectfully submit was a misapprehension, or, at least, a strained construction of, the case of The Amicable Society v. Bolland (4 Bligh. N. R., 194, 211),

better known as Fauntleroy's case. This case which will be found transcribed verbatim in petitioners' said brief was no more than this:

"Fauntleroy, having a policy of insurance on his life, was tried, convicted, and sentenced on October 30, 1824, and on November 30, 1824, was executed, for forgery, then a capital crime in England. On the day prior to his conviction he was duly adjudged a bankrupt and all his effects, including his insurance policy, duly assigned to appellees, Bolland et al., who sued on the policy and recovered at nisi prius. The entire facts were agreed on; there was no pretense but what Fauntlroy was justly and legally convicted, and, indeed, it was expressly agreed in the stipulation as to the facts on which the case was tried that 'a copy of the record of the indictment and conviction should be read and given in evidence on the hearing of the case, without further proof.' From the judgment in favor of Fauntleroy's trustees in bankruptcy the insurance association appealed and, delivering its opinion reversing the judgment, Lord Chancellor Lyndhurst, after stating the facts as above, said:

"The question under these circumstances is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance 'company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted and finally executed, whether under such circumstances, the parties representing him and claiming under him, can recover the sum insured in the policy so effected." * * "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crime—namely, the interest we have in the welfare and prosperity of our connexions? Now, if a policy of that description, with such a form of

condition inserted in it in express terms, can not, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that construction, which if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void? Upon this short and plain ground, therefore" * * * "I think that this policy can not be sustained, and that the respondents are not entitled to recover."

This Honorable Court, in the case of Ritter v. The Mutual Life Insurance Company of New York (169 U. S., 139), cited with approval the Fauntleroy case as assertive of the doctrine only that where the death of an assured is brought about by his own wilfull, deliberate act, when in sound mind, there can be no recovery on the policy, observing that "death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It can not be in contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk and hasten the day of payment of the insurance money."

This decision was also called to the attention of said Circuit Court of Appeals, but that court, notwithstanding, applied the Fauntleroy case in this wise: It laid it down as a principle that if an express condition were inserted in a policy of life insurance to the effect that it should be payable notwithstanding the death of the insured at the hands of the law, provided he were either in fact innocent of, or insane at the time of commission of, the offense for which he suffered, such provision would be void, as against public policy, and then held "that, if a policy with such a form of condition inserted in it in express terms can not on grounds of public policy be sustained, a policy without such a condition can not be enforced, on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void."

This is certainly not supported by either the Fauntleroy or the Ritter case, and, if it be conceded for the sake of argument that the expression of such a condition would preclude recovery on

the policy, it by no means follows that, if an innocent person is executed by judicial mistake, a recovery on his policy of life insurance would thereby be precluded.

If recovery in such case is precluded at all, it must be by force of the judgment of conviction, and the only authority, in this court at least, tending to this effect is the case of Coffey v. The United States (116 U. S., 436), cited by said Circuit Court of Appeals. But what was actually decided in that case was that, Coffey having been acquitted in a criminal case against him for a revenue offense, the judgment of acquittal was conclusive in a qui tam action against him for a penalty denounced against the same offense, because the punishment criminally and the penalty civilly were both parts of the entire punishment denounced against the offense, and besides both the parties and the issues in the two cases were identical. And so petitioners submit that authority, as well as reason, require that the said decision of said Circuit Court of Appeals shall not be allowed to stand as the law.

The premises considered, your petitioners respectfully pray that a writ of certiorari may be out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case therein entitled S. M. and H. R. Burt, plaintiffs in error, v. The Union Central Life Insurance Company of Cincinnati, Ohio, defendant in error, No. 864, to the end that the said case may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, A. D. 1891, or that your petitioners may have such other or further relief, or remedy, in the premises as to this court may seem appropriate, and, in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals, in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray, etc.

A. P. Tennell

Of Counsel for Petitioners.

THE STATE OF TEXAS,
COUNTY OF TRAVIS.

S. M. Burt, being duly sworn, on his oath says that he is one of the petitioners in the above petition, and has read the said petition by his counsel for him subscribed, and that the facts therein stated are true to the best of his information, advice and belief.

S. M. Burt

Sworn to and subscribed before me this 27 day of March A. D. 1901.

J. B. Rector
Notary Public,
Travis Co.,
Texas.

EXHIBIT A.

THE UNION CENTRAL LIFE INSURANCE COMPANY.

No. 133,671. $5,000 (Amount) $111.50 (Premium)

Age, 26.

In consideration of the statements made in the application for this policy, which application is hereby made a part of this contract; and of the annual payment of the sum of one hundred fourteen and 50-100 dollars, at the home office of the company, on or before the 30th day of July, at noon, in every year during the term of twenty years from date hereof, and of the payment, when due, of any and all notes given for premiums, or parts of same, does insure the life of William E. Burt (the insured), of Austin, in the county of Travis, and State of Texas, in the amount of Five Thousand Dollars, without participation in profits, for the term of his natural life. Upon the death of the insured, the company agrees to pay, at its home office, said amount of insurance to Anna M. Burt, his wife, if living; otherwise, to the executors, administrators or assigns of the insured, within sixty days after the receipt of notice and satisfactory proof of death, the balance of the year's premium, with any and all other indebtedness to the company, being first deducted. This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page hereof, which are made a part of this contract, which contract shall be held and construed to have been made in the City of Cincinnati, Ohio.

After three years' premiums shall have been paid on this policy, except in case of failure to pay at maturity a note given for premium or for a loan upon the security of this policy, the company will, upon legal surrender of this contract, before default of the payment of any premium, issue a paid up, non-participating policy, payable as herein provided for the amount as named in Table A, on the following page. . . .

In case of default in the payment of any premium after the third, except in case of failure to pay at maturity, a note given for premium, or for a loan upon the security of this policy, no surrender for a paid up policy having been made, as afore provided, this policy will be continued in force only as a paid up, non-participating term policy, for such time only as named in Table C, on the following page. If the death of the insured occurs, while the aforesaid term policy is in force, there shall be

deducted from the amount insured a sum equal to the regular annual premiums, with interest that would have accrued had this policy been kept in force, said deduction not to exceed three regular premiums with interest.

Upon legal surrender of this policy, on the 30th day of July, A. D. 1915, the company will pay in cash its entire reserved value, according to the actuaries' Table of Mortality, with 4 per cent interest, towit: The sum of $2194, provided this policy shall not have been terminated previously, by lapse, death or otherwise.

In witness whereof, the Union Central Life Insurance Company by its president and secretary, signs this contract, at Cincinnati, Ohio, this 1st day of August, 1895.

(Seal) JOHN M. PATTISON, President.

E. P. MARSHALL, Secretary.

CONDITIONS.

First.—The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes, given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy, without action on the part of the company, or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance.

Second—No suit to recover under this policy shall be brought after one year from the death of the insured.

Third—If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or, if the insured should die by self-destruction, whether sane or insane, within three years from date hereof, this policy shall be null and void, and, in case of said avoidance, the reserve value only, according to the actuaries' table of mortality, with four per cent interest, shall be paid on the surrender of this policy.

Except as hereinbefore provided, this policy shall be incontestible from any cause, except misstatement of age. In case the age of the insured shall have been misstated, the amount payable hereunder shall be such proportion of the sum insured, as

the premium paid bears to the required premium at the correct age of the insured.

NOTICE TO POLICY HOLDER.

The payments due on this policy for premiums, or notes or interest upon notes given to the company, are payable at the office of the company, in the City of Cincinnati, or to the authorized agent of the company, on the production of the premium receipt (signed by the President and Secretary) or the notes given in payment of the premium.

The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the President or Secretary of the company, whose authority for this purpose shall not be delegated.

Should this policy be assigned, or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest, produced with proofs of death. This company does not guarantee the validity of any assignment.

EXHIBIT B.

Exhibit B.

Certified copy of the entire record in the Circuit Court of Appeals:

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CAPTION.

United States of America,

Fifth Judicial Circuit,

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, begun on the third Monday in November, 1899, and held in the court room of said court in the City of New Orleans.

Before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States Circuit Judges for the Fifth Judicial District.

S. M. and H. R. Burt,

No. 864. v. Plaintiffs in Error.

Union Central Life Insurance Company of Cincinnati, Ohio,

Defendant in Error.

Be it remembered that, heretofore, towit: on the 4th day of August, 1899, a transcript of the record of the above styled cause from the Circuit Court of the United States, for the Northern(?) (Western) District of Texas, was filed in the office of the Clerk of said United States Circuit Court of Appeals, in the words and figures following, towit:

CAPTION.

BE IT REMEMBERED, that there was opened and begun to be holden, at Austin, Texas, a regular term of the United States Circuit Court for the Western District of Texas, Fifth Circuit, on the 3rd day of July, A. D. 1899; it being the first Monday in said month, and the day fixed by law for commencing a regular term of said Court at said place.

Present: The Honorable Thomas S. Maxey, United States District Judge.

Honorable Henry Terrell, United States Attorney for said District;

George L. Siebrecht, United States Marshal for said District, and

D. H. Hart, Clerk of said Court; When and where the following, among other proceedings were had to-wit:

S. M. & H. R. BURT

No. 2306. versus

THE UNION CENTRAL LIFE INSURANCE COMPANY.

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION.

Filed July 7, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin. Fifth Circuit.
July Term, A. D. 1899.

S. M. and H. R. Burt,
vs. No. 2306, Common Law.
The Union Central Life Insurance Company of Cincinnati, Ohio.

To the Honorable, the Circuit Court of the United States for the Western District of Texas, at Austin—Fifth Circuit:

Come now, by their attorney, your petitioners, S. M. Burt and H. R. Burt, and under leave of Court, first had, file this their first amended original petition in the above numbered and
2 entitled cause, amendatory and in lieu of their original petition, filed herein on the 16th day of December, A. D. 1898, and thereupon, complaining of the Union Central Life Insurance Company, of Cincinnati, Ohio, a corporation, which will be hereinafter styled defendant, respectfully represent:

First: That petitioners both reside in the County of Travis and State of Texas, while defendant is a private corporation, duly incorporated under the laws of the State of Ohio, having its principal office in the City of Cincinnati, in the County of Hamilton and State of Ohio, its president being one John M. Pattison, who also resides in said last-named city, county and state, and having also an agent for the transaction of its business in said Travis County, Texas, to-wit: One W. A. Boswell, who also resides in said last-named county and state.

Second: That heretofore, to-wit: On or about the 1st day of August, A. D. 1894, said defendant for a valuable consideration, made, executed, issued and delivered to one William E. Burt, of said Travis County, Texas, its certain contract, or writing obligatory, to-wit: A policy of life insurance on the life of said William E. Burt, (a copy whereof is hereunto annexed, marked Exhibit A and made part hereof), whereby, in consideration of the annual payment to it of the sum of one hundred and fourteen dollars and seventy cents, at its home office, on or before the 30th day of July, at noon, in every year during the term of twenty years from date of said policy, and of the payment when due of any and all notes given for premiums or parts of same, said defendant bound itself to pay to Anna M. Burt, the wife of said William E. Burt, if living, otherwise to his executors, administrators or assigns, the sum of five thousand dollars, within sixty days after the receipt by defendant of notice and satisfactory proof of death of said William E. Burt.

Third. That thereafter, to-wit: On or about the 10th day of September, A. D. 1895, the said named beneficiary Anna M.
3 Burt, joined by her said husband William E. Burt, made, executed and delivered, for a valuable consideration, to petitioners, who then were and still are creditors of said William E. Burt and Anna M. Burt, and were both brothers of said William E. Burt, a written conveyance, transfer or assignment whereby they assigned and conveyed to petitioners a one-half interest in said policy and the proceeds thereof, and in virtue whereof petitioners then became

and now are the owners of and entitled to, the said one-half share.

Fourth. That thereafter, to-wit: On or about the 24th day of July, A. D. 1896, said William E. Burt, being still alive, his said wife Anna M. Burt, died intestate, as did also on the same day her and said William E. Burt's two minor female children, Agnes Lucile and Anna E. Burt (the said two children being both unmarried and without issue or descendants) said two children being the only issue or descendants of her marriage with said Burt, or of either him or herself.

Fifth. That thereafter, to-wit: On or about the 4th day of February, A. D. 1897, said William E. Burt, being then the sole owner and successor of and to all the rights and interest of said Anna M. Burt in and under said policy of insurance, for a valuable consideration, made, executed and delivered to petitioners his certain written transfer, conveyance and assignment, whereby he assigned and conveyed to petitioners the said policy, together with all and singular his right, title and interest therein, authorizing them to receive and collect same when due and payable, and that thereby petitioners became entitled to and are now the owners of the remaining one-half interest in said policy.

Sixth. That whatever may be, or held or adjudged to be, the effect of said two instruments of assignment, or either of them, petitioners have become, and now are, nevertheless entitled to and the owners of said policy, the amount secured and agreed to be paid thereby and of any proceeds thereof, because they say that when the said insured William E. Burt died, as hereinafter stated, he died intestate, unmarried and without issue or descendants, and leaving surviving him neither father or mother, grandparents nor sister or brother, other
4 than petitioners, nor their descendants, so that petitioners, who are as aforestated his brothers, are and were his only heirs at law, and became and were, and now are, as such heirs, there being no administration on his estate nor necessity therefor, the legal owners and holders of said policy and entitled to the full amount agreed thereby to be paid, to-wit: said sum of five thousand dollars, according to the legal tenor and effect of said policy.

Seventh. That thereafter, to-wit: On or about the 27th day of November, A. D. 1896, the said insured William E. Burt, having been indicted under the alias of Eugene Burt, for the murder of his said wife, Anna M. Burt, in the District Court of Travis County, Texas, Twenty-sixth Judicial District, a court of competent jurisdiction, was in said Court tried and convicted therefor, of the offense of murder in the first degree, as in said indictment charged, and his punishment assessed at death, the defense of insanity having been interposed and put in issue,

among other things, on the trial, and that thereafter, to-wit: On or about the 26th day of April, A. D. 1898, in pursuance of said conviction, by a judgment and sentence of said District Court, on that day, said William E. Burt was by said District Court sentenced to be hanged; and that thereafter, to-wit: On or about the 27th day of May, A. D. 1898, pursuant to said judgment and sentence, and in virtue of a death warrant issued thereunder, the said William E. Burt was executed by the sheriff of Travis County, Texas, the proper officer to execute said sentence, by being on that day hanged by the neck until dead, and so on said day the said insured departed this life.

Eighth: That nothwithstanding said conviction, judgment and sentence, said William E. Burt, the insured did not in fact commit said offence, nor in fact kill or bring about the death of the said Anna M. Burt, his wife, nor participate therein, nor was he guilty of said crime. And further petitioners aver that, even if (which is not admitted but again expressly denied) the said Wiliam E. Burt participated in the death of his said wife, said Anna M. Burt, or in fact actually killed her, yet such participation or act, if any, on his part, violated no condition or obligation, express or implied in anywise incumbent on him under said policy, nor avoided said policy nor his agreement and contract of insurance thereunder, nor forfeited any right of either himself or petitioners thereunder, because they say that at the time of the death, as aforesaid, of said Anna M. Burt, said insured William E. Burt, although of sound physical health had become and was insane, or of such a perverted and deranged condition of his mental and moral faculties as to render him incapable of distinguishing between right and wrong, and unconscious at the time of said act, if act there was, by him committed, of its nature, or, though conscious of said act and also able to distinguish between right and wrong and know the act to be wrong, yet his will, or the governing power of his mind, had been involuntarily on his part, so completely destroyed that his actions were not subject to it, but were beyond his control. And so petitioners say that there was and is no forfeiture of said William E. Burt's or their rights under said policy, nor any release or discharge of any liability of defendant or in virtue of said policy, even if said William had actually killed the said Anna M. Burt, which is again denied

Ninth: That at the time of the death of said William E. Burt, the insured, said policy of insurance was a valid, binding and subsisting contract, and in full force and effect, and the first and second annual premiums due thereon, on to-wit: respectively July 30, 1895, and July 30, 1896, had been fully paid to, and

received, accepted and receipted for by, said defendant, and that, as to the only other annual premium falling due or becoming payable during the lifetime of said assured, same being the sum, as were the other two premiums, of one hundred and fourteen dollars and seventy cents, was on the day same became due, to-wit: on the 30th day of July, A. D. 1897, before the hour of 12 o'clock noon of said day, as provided in said policy, duly and legally offered and tendered to said company, defendant, and to its president said John M. Pattison, at the home office of defendant in the City of Cincinnati, in the State of Ohio, and acceptance thereof refused, and said company and its said president then and there notified that said money was held,
6 would be held and kept ready to be, and would be, at any time then or thereafter, paid to defendant, or its agents or order. And petitioners further say that said money is now, and has ever since been, kept and held ready to be so paid, and they now here again tender and offer to so pay same to defendant or to pay same into Court to be dealt with as the Court shall direct, although they say that by its refusal to accept same defendant has waived its rights to such payment.

Tenth: That heretofore, to-wit: on or about the 28th day of June, A. D. 1898, petitioners, being the sole legal owners and holders of said policy, and entitled to the said sum of five thousand dollars agreed to be paid thereby on the death of said William E. Burt, by defendant, within sixty days after receipt by it of notice and satisfactory proof of his death, presented to defendant, and it received such due and satisfactory notice and proof, as required by said policy, and made due demand of defendant for payment of said sum to them.

Eleventh: That by reason of the said death of said William E. Burt, the said sum of Five Thousand Dollars agreed in said policy to be paid, thereupon became due, and the said period of sixty days after receipt by defendant of notice and satisfactory proof of his death having expired prior thereto said sum became payable on or about the 28th day of August, A. D. 1898, and is now long past due. But petitioners say that although they are justly and legally entitled thereto, and although same is long past due, and although petitioners have often demanded payment of same, yet defendants have hitherto wholly failed and refused and still refuses to pay same, or any part thereof, to petitioners' great damage, to-wit: Ten Thousand Dollars.

Twelfth: That by reason of the facts aforestated and because defendant being a life insurance company, and liable therefor, has failed within the said sixty days specified in said policy, and after demand made therefor, as aforesaid, to pay the said sum of Five Thousand Dollars by said policy agreed to be paid, defendant has become liable and bound to pay to pe-

7 titioners, the holders of said policy, in addition to the said amount thereof, the further sum of twelve per cent. of said amount, or six hundred dollars, as damages, and also, further, all their reasonable attorney's fees for the prosecution of this suit and the collection of said amounts. And petitioners say that because of the failure and refusal of defendant to pay said policy they have been compelled to institute this suit and employ the services of attorneys at law and counsel therein, and pay their fees, and that reasonable fees for services of such counsel will amount to the sum of twenty-five hundred dollars.

Premises considered, petitioners pray judgment for their said debt, damages, interest, attorney's fees and costs, and for general relief, etc.

GARDNER RUGGLES,
Attorney for Petitioners, S. M. & H. R. Burt.

"EXHIBIT A."

The Union Central Life Insurance Company.
No. 133,671. $5,000. (amount). $114.70 (Premium.)
Age, 26.

In consideration of the statements made in the application for this policy, which application is hereby made a part of this contract, and of the annual payment of the sum of one hundred fourteen and 70/100 dollars, at the home office of the company, on or before the 30th day of July, at noon, in every year, during the term of twenty years from date hereof, and of the payment when due of any and all notes given for premiums, or parts of same, does insure the life of William E. Burt (the insured) of Austin, in the County of Travis in the State of Texas, in the amount of Five Thousand Dollars, without participation in profits, for the term of his natural life. Upon the death of the insured the company agrees to pay at its home office, said amount of insurance to Anna M. Burt, his wife, if living, other-

8 wise to the executors, administrators or assigns of the insured, within sixty days after the receipt of notice and satisfactory proof of death, the balance of the year's premium, with any and all other indebtedness to the company, being first deducted. This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page hereof, which are made a part of this contract, which contract shall be held and construed to have been made in the City of Cincinnati, Ohio.

After three years premiums shall have been paid on this policy except in case of failure to pay at maturity a note given for premium or for a loan upon the security of this policy, the com-

pany will, upon legal surrender of this contract, before default of the payment of any premium, issue a paid up, non-participating policy, payable as herein provided for the amount as named in Table A, on the following page.

In case of default in the payment of any premium after the third, except in case of failure to pay at maturity, a note given for premium, or for a loan upon the security of this policy, no surrender for a paid up policy having been made, as aforeprovided, this policy will be continued in force only as a paid up non-participating term policy, for such time only as named in Table C on the following page. If the death of the insured occurs, while the aforesaid term policy is in force, there shall be deducted from the amount insured a sum equal to the regular annual premiums, with interest that would have accrued had this policy been kept in force, said deduction not to exceed three regular premiums with interest.

Upon legal surrender of this policy on the 30th day of July, A. D. 1915, the company will pay in cash its entire reserved value, according to the Actuaries' Table of Mortality, with 4 per cent. interest, to-wit: The sum of $2,194, provided this policy shall not have been terminated previously, by lapse, death, or otherwise.

In witness whereof, the Union Central Life Insurance Company, by its president and secretary, signs this contract, at Cincinnati, Ohio, this 1st day of August, 1895.

9 JOHN M. PATTISON, President,

[Seal] E. P. MARSHALL, Secretary.

CONDITIONS.

First: The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance.

Second: No suit to recover under this policy shall be brought after one year from the death of the insured.

Third: If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by self-destruction, whether sane or

insane, within three years from date hereof, this policy shall be null and void, and in case of said avoidance the reserve value only, according to the actuarie's table of mortality, with four per cent interest, shall be paid on the surrender of this policy.

Except as hereinbefore provided, this policy shall be incontestible from any cause except misstatement of age. In case the age of the insured shall have been misstated the amount payable hereunder shall be such proportion of the sum insured as the premium paid bears to the required premium at the correct age of the insured.

Notice to Policy Holder.

All payments due on this policy for premiums or notes or interest upon notes given to the company, are payable at the office of the company in the City of Cincinnati, or to the authorized agent of the company on the production of the premium receipt (signed by the president or secretary) or the note given in payment of the premium.

The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose shall not be delegated.

Should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest produced with proofs of death. This company does not guarantee the validity of any assignment.

Indorsement: No. 2306. Law. S. M. & H. R. Burt vs. The Union Central Life Insurance Co. Plaintiff's First Amended Original Petition. Filed July 7, 1899. D. H. Hart, Clerk. Gardner Ruggles, Attorney for Petitioners.

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER.

Filed July 7, 1899.

S. M. & H. R. Burt,

vs.

Union Central Life Insurance Company.

Suit Pending in the Circuit Court of the United States, for the Western District of Texas.

And now comes the defendant, and with leave of the Court had and obtained, files this, its first amended original answer, in lieu of its original answer filed herein on the 7th day of February, 1899, and says:

It demurs to the first amended original petition of plaintiffs filed herein on the 7th day of July, 1899, and says that the same is insufficient to state a cause of action against this defendant, for the reason that it appears from the allegations therein that the assured died at the hands of the law under judgment of a Court of competent jurisdiction; and of this, defendant prays the judgment of the Court

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GEORGE F. PENDEXTER,
GEO. E. SHELLEY,
Attorneys for Defendant.

And for special exception herein, if need be, defendant says that so much of said petition as seeks to recover attorney's fees, and twelve per cent. on the amount of the policy sued upon, for the reason that the laws of Texas, to-wit: Art. 3071 Revised Statutes of Texas, under which said claim is asserted, is in contravention of the Fourteenth Amendment to the Constitution of the United States, and hence states no valid cause of action against this defendant; and of this it prays the judgment of the Court.

GEO. F. PENDEXTER,
GEO. E. SHELLEY
Attorneys for Defendant.

And for answer herein, defendant denies all and singular the allegations in plaintiffs' petition contained, except in so far as the same are hereinafter admitted to be true, and demands strict proof of the same; and of this it puts itself upon the country.

And for answer in this behalf, defendant says that the plaintiffs ought not to have and maintain this suit, because the policy made the basis thereof, and all rights thereunder, were forfeited because the second premium due thereon was not paid on the date it fell due, to-wit: July 30, 1896, and defendant says that by the terms of said policy, it is provided as follows:

"The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes or interest upon notes given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions,

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which may be given for premiums or loans upon the security of this policy are hereby made a part of this contract of insurance."

And said policy contains the further provision and stipulation, to-wit:

"All payments due on this policy for premiums, or notes, or interest upon notes given to the company, are payable at the office of the company in the City of Cincinnati, or to the authorized agent of the company, on the production of the premium receipt (signed by the president or secretary) or the note given in payment of the premium."

That William E. Burt to whom said policy was issued was living on the 30th day of July, 1896, the day upon which the second premium thereon was due as aforesaid; that said William E. Burt failed and refused to pay said premium on said day, or to tender payment thereof, but that thereafter, to-wit: On or about August 1, 1896, the plaintiffs herein tendered to Jefferson Johnson, who, at that time, was the duly authorized agent of defendant, at Austin, Texas, appointed by it under and by virtue of the provision of the policy hereinbefore set out, to receive said premium, and who, at that time, held the regular renewal receipt for said premium duly signed by the proper officers of defendant, of which fact plaintiffs then had notice, and which said tender was by said Johnson refused, and no receipt delivered therefor; that previous to the time said premium fell due, the said William E. Burt did, on, to-wit: The 24th day of July, 1896, at Austin, Texas, murder his wife, Anna M. Burt, the beneficiary named in said policy, and his two minor children, Agnes Lucile Burt and Anna E. Burt, and was, at the time said tender was made, a fugitive from justice, which fact was well known to plaintiffs, at and before the time they made said tender; that the crime of murder was and is a capital crime, under the laws of the State of Texas, and punishable by death; that thereafter upon the refusal of defendant's said agent,

13 Johnson, to receive said second premium, the plaintiffs, for the purpose of over-reaching and defrauding this defendant, caused the amount of said premium to be remitted by telegraph from Austin, Texas, to the home office of defendant at Cincinnati, Ohio; that in the transmission of said amount, plaintiffs concealed from the officers of defendant, at Cincinnati, Ohio, the fact that the said premium had been tendered to and refused by defendant's authorized agent, the said Johnson, and concealed and withheld from defendant the fact that William E. Burt was a fugitive from justice, suspected of and charged with, the murder of his wife, the said Anna M. Burt and her children, and of which facts defendant had no notice; that in the telegraphic tender of said premium, the plain-

tiffs falsely and fraudulently stated that the same was made on behalf of the beneficiaries, when they well knew that Anna M. Burt, the only beneficiary named in said policy was then dead; and defendant charges that it was the wilful, deliberate purpose of the plaintiffs in making said tender, to fraudulently conceal from defendant, the increased risk occasioned by the crime of the said William E. Burt; and further, to conceal from defendant the fact that the said Anna M. Burt, the beneficiary named in said policy was dead, and that said plaintiffs sought by said telegram to fraudulently conceal from defendant the further fact that they then claimed to be the sole beneficiaries under said policy; that said money was received by one W. L. Davis, an employe, to-wit, cashier, in the home office of defendant, who defendant says had no authority or power to receive the same; that said Davis had not been appointed or authorized by defendant to receive said premium, or any other premium, and had not been given, and did not have, a renewal receipt for said premium signed by the president or secretary of defendant; that immediately after defendant learned of the facts aforesaid, it repudiated and disavowed the action of said Davis in receiving said premium and insisted upon the enforcement of said forfeiture, and at once tendered to plaintiffs the amount of said premium, and now here tenders the same in open
14 Court.

(3). And defendant says that said policy contains the further provision, to-wit: "The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose shall not be delegated." And defendant says that there was no agreement in writing by its president or secretary by which said forfeiture was waived. Wherefore, defendant says that it ought not, by reason of the facts aforesaid, to be held to have waived said forfeiture. And defendant further says that plaintiffs have never paid or tendered to be paid the third premium on said policy; wherefore the said policy under its terms, was forfeited.

(4). And for further answer in this behalf, defendant says that William E. Burt, the assured, under whom plaintiffs claim, to-wit: On the 24th day of July, 1896, murdered his wife, Anna M. Burt, the beneficiary named in said policy, and by reason of whose death alone could said William E. Burt become entitled to any interest in said policy, and that said Burt, by reason of said murder, forfeited any and all rights which he might otherwise have had as the heir or next of kin of said Anna

M. Burt, and therefore, that plaintiffs, as the heirs of the said William E. Burt, can have no right to recover on said policy.

(5). And for further answer in this behalf defendant says, that on, to-wit: October 12, 1896, said William E. Burt, under the alias of Eugene Burt, was indicted in the District Court of Travis County, Texas, a Court of competent jurisdiction, for the murder of his said wife, Anna M. Burt, and that thereafter, to-wit: on the 27th day of November, 1896, in said Court, the said William E. Burt was duly and legally convicted of murder in the first degree, on said indictment, and his punishment assessed at death; and that on the trial of said W. E. Burt, his sanity, at the time he committed the offence for which
15 he was on trial, was directly put in issue, and the jury found him to have been sane when said offense was committed. And that thereafter, to-wit: on the 26th day of April, 1898, by virtue of said judgment of conviction, the said William E. Burt was, by said Court, duly sentenced to be hanged; that thereafter, to-wit: On the 27th day of May, 1898, the said William E. Burt was duly hanged by the Sheriff of Travis County, Texas, under and by virtue of the death warrant issued under said judgment.

Wherefore defendant says that plaintiffs ought not to recover, because it would be against public policy to permit the plaintiffs to recover on said policy, the said William E. Burt having died at the hands of public justice in the manner hereinbefore stated.

Wherefore, defendant prays that plaintiffs take nothing by this suit, and that it go hence and recover of plaintiffs all costs.

GEO. F. PENDEXTER,
GEO. E. SHELLEY,
Attorneys for Defendant.

[Indorsed:]

No. 2306. S. M. & H. R. Burt vs. Union Central Life Insurance Co. Defendant's First Amended Original Answer. Filed this 7 day of July, 1899. D. H. Hart, Clerk, By J. W. Hancock, Deputy.

JUDGMENT.

Entered July 10, 1899.

No. 2306. S. M. & H. R. Burt
vs.
The Union Central Life Insurance Company.

And now, on this 10th day of July, 1899, this cause being regularly called for trial, came the parties by their respective attorneys and announced themselves ready for trial. Whereupon the general demurrer and special exceptions interposed by the defendant to the first amended original petition of plaintiff were submitted to the Court; and the Court, having heard the argument of counsel thereon, and being fully advised thereon, being of the opinion that the law is with the defendant:

16 It is therefore considered, ordered, adjudged and decreed by the Court that said demurrer and special exceptions be and they are hereby sustained. And the plaintiff declining to amend the case is hereby dismissed. And it is further ordered, adjudged and decreed by the Court that the plaintiffs take nothing by their suit, and that the defendant go hence and recover of plaintiffs all costs in this behalf expended for which let execution issue. To which ruling and judgment of the Court the plaintiffs then and there in open Court excepted.

PLAINTIFF'S PETITION FOR WRIT OF ERROR.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. Burt
vs. N. 2306. Com. Law.
The Union Central Life Insurance Company, of Cincinnati, Ohio.

To the Honorable, the Judges of the Circuit Court of Appeals of the United States for the Fifth Circuit:

Come now the above named plaintiffs by their attorney, and complain that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause in said Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Judicial Circuit, at its July term, A. D. 1899, of said Court, against said plaintiffs, on the 10th day of July, A. D. 1899, manifest error hath happened to the great damage of said plaintiffs:

Wherefore, said plaintiffs, and each of them, pray for the allowance of a writ of error, and for an order fixing the amount of bond for a supersedeas in said cause, and for such other or-

ders and process as may cause the same to be corrected by the said Circuit Court of Appeals of the United States for
17 the Fifth Judicial Circuit.

Dated this 10th day of July, A. D. 1899.

GARDNER RUGGLES,
Attorney for Plaintiffs.

Granted, July 10, 1899. T. S. MAXEY, Judge.

[Indorsed:]

No. 2306, Com. Law. S. M. & H. R. Burt vs. The Union Central Life Insurance Company of Cincinnati, Ohio. Plaintiff's Petition for Writ of Error. Filed July 10, 1899. D. H. Hart, Clerk. Gardner Ruggles, Attorney for Plaintiffs.

PLAINTIFFS' ASSIGNMENTS OF ERROR.
Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. Burt
vs. No. 2306.
The Union Central Life Insurance Company of Cincinnati, Ohio.

Come now the plaintiffs in the above numbered and styled cause, by their attorney, and file the following assignments of error upon which they will rely in their prosecution of the writ of error in said cause.

First Assignment of Error.

That the Honorable, the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Judicial Circuit, erred in sustaining the demurrer interposed by the defendant to the first amended original petition of plaintiffs, filed in said cause on the 7th day of July, A. D. 1899, and by holding and deciding that the facts stated in the said amended original petition are not sufficient to constitute or show a cause of action in said plaintiff's favor against said defendant.

Second Assignment of Error.

That said Circuit Court erred in sustaining the first ground

of demurrer interposed by defendant to the first amended original petition of plaintiffs, filed July 7, A. D. 1899,
18 and by holding, deciding and adjudging that said amended original petition does not state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant, because it appears from said petition that William E. Burt, the assured in the policy of life insurance sued on, was indicted, tried, convicted and sentenced to death in a Court of competent jurisdiction, of the offense of murder in the first degree and was executed in pursuance of such sentence, although it was also alleged in said petition that, notwithstanding such sentence and execution, said insured did not, in fact, commit, cause, or participate in said murder, but was at the time of its commission, and whether he committed or participated in it or not, insane, unconscious of the nature of his actions, if any, and wholly irresponsible therefore, said Circuit Court holding and deciding that the defense, amongst others of insured's insanity having been an issue in said criminal cause, said conviction, sentence and execution of insured were conclusive as against plaintiffs' right to recover on the policy of insurance on his life, in controversy herein, whether insured in fact committed, caused or participated in said crime or not, and whether he was insane or not when it was committed.

Third Assignment of Error.

That said Circuit Court erred in sustaining the second ground of demurrer and special exception interposed by defendant to plaintiffs' said amended original petition, filed as aforesaid, in said cause, and by holding, deciding and adjudging that said amended original petition, in so far as it seeks a recovery by plaintiffs against defendant of the sum of twelve per cent. on the amount of the policy of life insurance sued on, as damages, and a recovery of attorney's fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant in that behalf, because the statute or law of the State of Texas, to-wit: Article 3071, of the Revised Civil Statutes of the State of Texas, under and in virtue of which said two claims are asserted, is violative and in contravention of the Fourteenth Amendment to the Constitution of the United
19 States.

Fourth Assignment of Error.

That said Circuit Court erred in rendering judgment against plaintiffs in said cause sustaining said demurrer and exceptions

and dismissing plaintiffs' suit upon the pleadings in said cause, and that said judgment is contrary to law and the facts as stated in said pleadings in said cause.

Wherefore the said plaintiffs pray that said judgment of said Circuit Court be reversed and such directions be given that full force and efficiency may inure to plaintiffs by reason of the aforesaid causes of action set forth and alleged in their said amended original petition filed in said cause.

GARDNER RUGGLES,
Attorney for Plaintiffs, being also Plaintiffs in Error.

(Indorsement): No. 2306. Com. Law. S. M. & H. R. Burt vs. The Union Central Life Insurance Company of Cincinnati, Ohio. Plaintiffs' Assignment of Error. Filed July 10, 1899. D. H. Hart, Clerk.

WRIT OF ERROR BOND.

Approved and filed July 10, 1899.

Know All Men By These Presents: That we, S. M. Burt and H. R. Burt, as principals, and ..... as sureties, are held and firmly bound unto The Union Central Life Insurance Company of Cincinnati, Ohio, in the full and just sum of Five Hundred Dollars, to be paid to the said The Union Central Life Insurance Company of Cincinnati, Ohio, and its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 10th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

20 Whereas, lately at a session of the Circuit Court of the United States for the Western District of Texas at Austin, Fifth Circuit, in a suit depending in said Court, between the said S. M. Burt and H. R. Burt, plaintiffs, and the Union Central Life Insurance Company of Cincinnati, Ohio, defendant, a final judgment was rendered against the said S. M. Burt and H. R. Burt, plaintiffs, and the said S. M. Burt and H. R. Burt, plaintiffs, having obtained from said Court a writ of error, and filed a copy thereof in the clerk's office of the said Court to reverse the final judgment aforesaid, in the aforesaid suit, and a citation directed to the said The Union Central Life Insurance Company of Cincinnati, Ohio, defendant, is about to be issued, citing and admonishing it to be and appear before the

United States Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said S. M. Burt and H. R. Burt, plaintiffs, shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

S. M. BURT, [Seal]
H. R. BURT, [Seal]
GEO. W. LITTLEFIELD, [Seal]
WM. R. HAMBY. [Seal]

Sealed and delivered in presence of:
SAM SHELLEY,
FRANK SMITH.

Approved this the 10th day of July, A. D. 1899.

T. S. MAXEY,
United States Judge.

(Indorsement): No. 2306, Law. S. M. Burt and H. R. Burt vs. The Union Central Life Insurance Company of Cincinnati, Ohio. Bond. Filed July 10, 1899. D. H. Hart, Clerk

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21 PLAINTIFFS' BILL OF EXCEPTIONS AND APPROVAL OF SAME.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. Burt
vs. No. 2306. Com. Law.
The Union Central Life Insurance Company of Cincinnati, Ohio.

Be it remembered that on this the 10th day of July, A. D. 1899, the above numbered and entitled cause coming on for trial came on to be heard the demurrer and special exceptions of the defendant to the plaintiffs' first amended original petition, filed herein on the 7th day of July, A. D. 1899, as follows:

First: It was objected by defendant to plaintiffs' said amended original petition that same was insufficient in law to state a cause of action against defendant in favor of plaintiffs because it appears from the allegations thereof that William

E. Burt the insured in the policy of life insurance sued on herein died at the hands of the law, it being alleged in said petition that said insured was indicted, tried, convicted and sentenced to death in a Court of competent jurisdiction in that behalf, of the offense of murder in the first degree, notwithstanding a plea, in his behalf, among other defenses of his insanity, and was, pursuant to said sentence executed, although it was also alleged in said petition that notwithstanding said indictment, trial, conviction and sentence, said insured did not in fact commit said murder, nor cause nor participate in same, but that, if he did, or whether he did or not, he was, at the time same was committed, insane, unconscious of the nature of his acts and wholly irresponsible therefor.

Second: It was objected also by defendant to plaintiffs' said amended original petition that same, in so far as it seeks a recovery, in favor of plaintiffs against defendant, of the sum of twelve per cent. on the amount of the policy of life insurance sued on by plaintiffs, as damages, and a recovery of attorney's fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant, in that behalf, because the statute or law of the State of Texas, under and in virtue of which said two claims are asserted is violative and in contravention to the Fourteenth Amendment to the Constitution of the United States.

22

And thereupon the said objections of defendant to said amended original petition, as raised by its said demurrer and exceptions, were both sustained by the Court, the Court holding, as to said first ground of demurrer, that, insured's sanity having been in issue in said criminal cause, his conviction and sentence, and his execution pursuant thereto, were conclusive as against plaintiffs' right to recover on the policy of insurance on his life in controversy herein, whether insured in fact, committed, or caused or participated in said crime or not, or whether he was insane or not, when it was committed, and thereupon the Court rendered judgment dismissing plaintiff's suit.

And to the said rulings, and order and judgment of the Court, sustaining said demurrer and exceptions and dismissing said suit, plaintiffs excepted and now here by their attorney present and tender this their bill of exceptions thereon, and pray that same may be settled and allowed and signed, sealed and certified by the Judge of this Court, as provided by law.

GARDNER RUGGLES,
Attorney for Plaintiffs.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. Burt
vs. No. 2306, Com. Law.
The Union Central Life Insurance Company of Cincinnati, Ohio.

The above and foregoing bill of exceptions presented by plaintiffs is in all respects correct and is hereby approved, allowed and settled, and ordered to be made a part of the record herein.

24

Signed and dated this 10th day of July, A. D. 1899, a day of the July term, A. D. 1899, and done in open Court.

T. S. MAXEY, Judge.

(Indorsement): No. 2306. S. M. & H. R. Burt vs. The Union Central Life Insurance Company, of Cincinnati, Ohio. Plaintiffs' Bill of Exceptions and Order Settling and allowing same. Filed July 10, 1899. D. H. Hart, Clerk.

UNITED STATES OF AMERICA, ss.

The President of the United States, to the Honorable the Judge of the Circuit Court of the United States for the Western District of Texas—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between S. M. and H. R. Burt, plaintiffs, and The Union Central Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said S. M. and H. R. Burt, plaintiffs, as by said complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of July in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal] D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas, at Austin.

Allowed this, the 10th day of July, A. D. 1899.

T. S. MAXEY,
United States Judge.

(Indorsement): No. 2306. S. M. & H. R. Burt vs. Union Central Life Insurance Company. Writ of Error. Filed July 10, 1899. D. H. Hart, Clerk.

I hereby waive issuance of citation in error and accept service thereof. GEO. F. PENDEXTER,
July 10, 1899. Atty. for Deft.

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25 STIPULATION AS TO TRANSCRIPT AND WAIVER OF CITATION.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. Burt
No. 2306. vs. Com. Law.
The Union Central Life Insurance Company, of Cincinnati, Ohio.

In this cause it is agreed by and between plaintiffs and defendant, as follows:

First: That defendant hereby waives actual issue and service of citation in error, and accepts service of same, and agrees to appear and join issue in the Circuit Court of Appeals of the United States for the Fifth Circuit, just as if all formalties had been duly complied with.

Second: That the transcript of the record for said Circuit Court of Appeals shall consist only of copies of the following papers, viz: (1.) Plaintiff's First Amended Original Petition, Filed July 7, 1899. (2.) Defendant's First Amended Original Answer, filed same day. (3.) Judgment and order of Circuit Court sustaining defendant's demurrer and exceptions to plain-

tiffs' petition and dismissing plaintiffs' suit. (4.) Plaintiffs' petition for writ of error. (5.) Order thereon. (6.) Plaintiffs' assignments of error. (7.) Plaintiffs' bond for writ of error, and order of approval. (8.) Plaintiffs' bill of exceptions and order settling and allowing same. (9.) Writ of error; and (10.) this stipulation.

Third: Plaintiffs shall have until October 1st, 1899, to file their briefs in said Circuit Court of Appeals, and defendants shall have until November 1st, to file its briefs.

Witness our hands this 10th day of July, A. D. 1899.

S. M. BURT and H. R. BURT, Plaintiffs,
By GARDNER RUGGLES, their Attorneys,
26 THE UNION CENTRAL LIFE INSURANCE CO.,
By GEO. F. PENDEXTER, Atty.

(Indorsement): No. 2306. S. M. & H. R. Burt vs. Union Central Life Insurance Company. Stipulation. Filed July 10, 1899. D. H. Hart, Clerk.

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27 [CERTIFICATE OF CLERK.]

Dated July 13, 1899.

The United States of America,
Western District of Texas

I, D. H. Hart, Clerk of the Circuit Court of the United States for the Western District of Texas, hereby certify that the foregoing on twenty-six pages contain a full, true and correct copy of all papers filed and proceedings had in Case No. 2306, S. M. & H. R. Burt vs. The Union Central Life Insurance Company, of Cincinnati, Ohio, as same appear on file and of record in this office; and that the original writ of error and waiver of citation in error are incorporated in this record.

In testimony whereof, witness my official signature and seal, at office in Austin, Texas, this the 13th day of July, A. D. 1899.

[Seal] D. H. HART,
Clerk of the U. S. Circuit Court for the Western District of Tex.

Printed by E. S. UPTON, 631 Poydras,
New Orleans, La.

22

UNITED STATES CIRCUIT COURT OF APPEALS.

Fifth Circuit.

November Term, 1899.

April 23, 1900.

(Extract from minutes.)

S. M. Burt et al.,

v. No. 864.

Union Central Life Insurance Company.

This cause was regularly called this day, and submitted to the court upon briefs of counsel heretofore filed.

November Term, 1900.

December 4, 1900.

(Extract from minutes.)

S. M. and H. R. Burt,

v. No. 864.

Union Central Life Insurance Company.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiffs in error, S. M. Burt and H. R. Burt, and the sureties on the writ of error bond herein, George W. Littlefield and Wm. R. Hamby, be condemned to pay the costs of this cause in this court for which execution may be issued out of said Circuit Court.

23

No. 864.

UNITED STATES CIRCUIT COURT OF APPEALS.

Fifth Circuit.

November Term, 1900.

S. M. and H. R. Burt, Plaintiffs in Error,

v.

The Union Central Life Insurance Company of Cincinnati, Ohio, Defendant in Error.

PETITION FOR REHEARING BY PLAINTIFFS IN ERROR.

To the Honorable, the United States Circuit Court of Appeals, for the Fifth Circuit:

Your petitioners, plaintiffs in error in the above numbered and

entitled cause, having carefully examined the opinion therein of this Honorable Court, think, and respectfully submit, that, with propriety, they may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to plaintiffs in error, on the following grounds, on which it is respectfully submitted that this court was in error in said opinion, towit:

First—That, while a contract of life insurance in terms payable, notwithstanding the death of the assured at the hands of the law, as the result of capital conviction in the established courts of competent juridiction, in event such conviction should be unjust or unwarranted by the evidence, might and probably would be void, as being against public policy, the mere fact of the death of the assured at the hands of the law as the result of such capital conviction, if he were in fact innocent (that is, either did not commit the crime or was insane when it was committed), would not avoid a contract of insurance otherwise valid.

Second—That the judgment and sentence to death of assured in a court of competent juridiction was admissible only because pleaded by plaintiffs in error, and even then could only establish the fact of its own rendition, and was neither admissible nor conclusive to establish the facts on which it was rendered, nor any of such facts, nor was it an adjudication of such matters as to be within any of the rules relating to res adjudicata.

Third—That liability of defendant in error on the policy of life insurance in controversy, same being originally a valid contract, could only be avoided by some subsequent act of the assured operating a forfeiture, and to effect such forfeiture assured must either have done some act expessly or impliedly forbidden, or omitted some duty expressly or impliedly required, by the contract. There is no omission of duty involved, and his sentence and death at the hands of the law furnished no such act, if in fact he was either innocent or insane at the time of the commission of the act for which he was convicted and executed.

Finally, plaintiffs in error respectfully suggest that this court again consider the points taken in their brief herein to the effect that, the policy of insurance in controversy being silent thereon, the death of the assured, William E. Burt, at the hands of the law as the result of the judgment and sentence of death pronounced upon him by the District Court of Travis County, Texas,

did not and could not preclude a recovery on said policy by plaintiffs in error, if in fact said Burt was either innocent of the crime for which he was convicted or insane at the time of its commission, if he did actually commit it.

Wherefore, upon the foregoing grounds these plaintiffs in error respectfully pray this Honorable Court to grant them a rehearing of said case.

GARDNER RUGGLES,

Attorney and Counsel for Plaintiffs in Error, S. M. and H. R. Burt.

I, Gardner Ruggles, attorney and counsel for the plaintiffs in error herein, S. M. and H. R. Burt, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

GARDNER RUGGLES.

Austin, Texas, December 21, 1900.

November Term, 1900. 26

January 15, 1901.

(Extract from minutes.)

S. M. and H. R. Burt,

v. No. 864.

Union Central Life Insurance Company.

Ordered, that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

UNITED STATES CIRCUIT COURT OF APPEALS. 27

Fifth Circuit.

November Term, 1900.

Filed December 4, 1900.

S. M. and H. R. Burt, Plaintiffs in Error,

v. No. 864.

Union Central Life Insurance Company, Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Before Pardee, McCormick and Shelby, Circuit Judges:

The case is stated in the opinion.

Mr. Gardner Ruggles was on the brief for plaintiff in error.

Mr. Geo. F. Pendexter and Mr. Geo. E. Shelby were on the brief for defendant in error.

Shelby, Circuit Judge, delivered the opinion of the court.

This suit is on a life insurance policy and is brought by S. M. Burt and H. R. Burt, citizens of Texas, against the Union Central

Life Insurance Company, a corporation chartered under the laws of Ohio. The policy was issued by the defendant on August 1, 1894, for $5000, on the life of William E. Burt, and was payable at his death to his wife, Anna M. Burt, if living, otherwise to the executors, administrators, or assigns of the insured, within sixty days after proof of death. The annual premiums for the policy were duly paid. The policy contained no provision for forfeiture in the event that the insured should be executed under sentence of the law. On September 10, 1895, Anna M. Burt and William E. Burt assigned in writing to the plaintiffs, to whom they were indebted, a one-half interest in the policy. Anna M. Burt died intestate on July 24, 1896. She left surviving her no descend-
28 ants, and her husband, William E. Burt, became entitled to any interest she had in the policy. By assignment from William E. Burt, and as his heirs and next of kin, the plaintiffs are the sole owners of the policy.

William E. Burt was indicted for the murder of Anna M. Burt in the District Court of Travis County, Texas, and was tried on November 27th, 1895. In addition to the plea of not guilty, he plead insanity. He was found guilty by the jury of murder in the first degree, and was by the court sentenced to be hanged, and on May 27, 1898, pursuant to the sentence, he was executed by the Sheriff of Travis County, Texas. These facts are all alleged in the plaintiffs petition. The petition then avers that the insured, William E. Burt, was in fact innocent of the crime of which he was convicted. To quote the petition as abridged by the plaintiffs' counsel: "Notwithstanding said conviction and sentence, said William E. Burt did not in fact commit said murder nor participate therein, but that if he did, his policy was not avoided thereby because he was insane." The defendant demurred to the petition because it appeared therefrom that the insured died at the hands of the law under judgment of a court of competent juridiction. The Circuit Court, Judge Maxey presiding, sustained the demurrer. The plaintiffs declining to amend the petition, the case was dismissed. In this court it is assigned that the Circuit Court erred in sustaining the demurrer.

The industry of counsel has been able to find but one case in which a suit was brought on a life insurance policy when the insured had been tried and executed for the commission of crime.

That case is the Amicable Society v. Bolland, 4 Bligh., N. R., 194, 211, and it is better known and oftener cited as the Fauntleroy case. It was an action by assignees in bankruptcy to collect a policy of insurance on the life of one Fauntleroy. The policy was made payable to his administrators or assigns. Fauntleroy was convicted of forgery, then a capital offense, and was executed. The Lord Chancellor (Lyndhurst) delivered the opinion. After stating the case, he said: "The question under these circumstances is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to 29
say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the Noble Lord now present, and we have both come to the conclusion that the assignees can not maintain this suit.

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself, this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connections? Now if a policy of that description, with such a form of condition inserted in it in express terms, can not, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that contention went at least, altogether void." This case has been cited approvingly in many text books on insurance and by the Supreme Court of the United

States. Ritter v. Mutual Life Insurance Company of New York, 169 U. S., 139. That it correctly states the law has never been questioned so far as we know. It is quoted and relied on by the learned counsel for both parties ot this suit. It is conceded, however, that there is a material difference between the facts of that case and this. Here the petitioners aver that the insured was guiltless although convicted and executed. They aver in another count that, if he actually killed his wife, he was insane when he committed the act, and that the defense of insanity was presented unsuccessfully at the trial. If the insured did commit the homicide when insane, he was not guilty of murder. The meaning of the petition, therefore, is that at the trial of Burt, the insured, there was a miscarriage of justice—that he was unjustly convicted. It must be and is conceded as settled law that, if he had been rightfully convicted, his assignees could not recover on the policy because, as was held in the Fauntleroy case (stating the point most favorably for the plaintiffs in error), the policy would have been void if it had expressly provided for payment of the amount thereof on the just conviction and execution of the insured. Does a contract for insurance, having no special provision on the subject, cover the loss when the insured is tried and condemned in and executed by an order of a court of competent jurisdiction, when he is in fact innocent of the crime with which he is charged? This precise question, we are advised by counsel, has never been decided. We will apply to the question the illustration used by the court in the Fauntleroy case. Would the policy sued on have been valid if it had provided, in the event of the insured's being indicted, tried, convicted, and executed for murder, when in fact he was innocent, that the amount of the policy should be paid to his administrators or assigns? This condition would not be as encouraging to the insured determined on crime as that supposed by Lord Lyndhurst, but it would at lesat let him understand that the provision he had made by insurance for those connected with him would not be conclusively lost by his conviction and execution —that the beneficiaries would have a right of action on the policy with chances of success, even if he was apprehended, convicted and executed.

It is well settled that no one can lawfully contract to do that which has a tendency to be injurious to the public or against the

public good. Can there be a legal life insurance against the miscarriage of justice? Can contracts be based upon the probability of judicial murder? If one policy so written be valid, the business of insuring against the fatal mistakes of juries and courts would 31
be legitimate. The same principle could be applied, in a kind of accident insurance, to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another court and jury not infallible. That juries and courts do make mistakes is unquestionable. It may be admitted that the history of criminal jurisprudence shows that innocent defendants have in rare instances, by a departure from proper rules of evidence, been convicted of murder and executed. Cases in which the juries, the courts, and the pardoning power are so at fault, are so rare that they are not likely to be in the contemplation of parties making contracts of life insurance. The terms of the contract of life insurance, it seems, would exclude the idea, as in the case of suicide by the insured while sane, that death at the hands of the law was within the contemplation of the contracting parties. Ritter v. Mutual Life Insurance Company of New York, 169 U. S., 139. But if parties make express contracts on the subject could the courts lawfully enforce them? It is the policy of every state or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kinds were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon by the executive. Such contracts would encourage litigation and bring reproach upon the State, its judiciary and executive, and would, we think, be against public policy and void. The policy of the law often permits and even requires for error a new trial of a convicted defendant, but never after his execution. The principle that makes void a wagering contract as to a rise or fall in the price of goods in the markets (Irwin v. Williar, 110 U. S., 499) would make void for stronger reasons a contract based on the

failure of courts and juries to perform their respective duties. Now, to apply the reasoning of Lord Lyndhurst in the Fauntleroy case, if a policy with such a form of condition inserted in it in express terms can not on grounds of public policy be sustained, a policy without such a condition can not be enforced on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void.

In some cases it has been held that a trial and conviction or acquittal in a criminal case is conclusive as to the facts decided when brought in question by the parties in a subsequent civil suit. Coffey v. United States, 116 U. S., 436; Roberts v. State of New York, 160 N. Y., 217, 224, and 30 Hun. (N. Y.), 106. But the authorities on this subject are conflicting. 1 Freeman on Judgments (4th ed.), sec. 319, and cases there cited. The assignee takes the policy subject to all defenses and equities which attached to it in the hands of the assignor. Bliss on Life Insurance, sec. 331. If the judgment of conviction against Burt is conclusive as to his guilt in this suit by the assignees of the policy, this case would be brought precisely within the principle decided in the Fauntleroy case, for the averment in the petition of the conviction of Burt would avoid the effect of the allegation of his innocence. But we prefer to base our conclusion on the ground that a contract of life insurance, written to insure against a capital conviction in the established courts of competent jurisdiction in the event that such conviction is unjust and unwarranted by the evidence, is void as being against public policy.

The judgment of the Circuit Court is affirmed.

(Filed Dec. 4, 1900.)

No. 864.

S. M. BURT and H. R. BURT, Plaintiffs in Error,

v.

UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, Defendant in Error.

McCormick, Circuit Judge, dissents.

I can not concur in the judgment of the court in this case. It seems to me that the case does not call in question in any manner, or come under the authority of, or the reasoning in the case of Amicable Society, etc., v. Polland, 4 Bligh, N. R., 194, 211.

The action might very well have been brought in the common

form on the policy of insurance and left it to the defendant to raise by its answer the questions that are herein raised. The plaintiffs, being so advised, chose to raise the question as they have done in their petition. The petition implies, if it does not expressly announce, that if the insured was in fact guilty of murder, and his death occurred by the execution of the sentence against him for that crime, the proof of such facts would avoid the civil contract on which this action is brought. The holders of the policy, however, expressly allege that the assured did not commit the homicide charged against him, and that if he did commit the homicide he was in such condition of mental disorder as rendered him incapable at the time of committing murder. They alleged that these pleas were presented on the trial of the indictment against the assured, and that on that trial, in a court of competent jurisdiction, the verdict and judgment were rendered against him and sentence of death pronounced upon him and executed. The demurrer, which was sustained in the Circuit Court, must assume either that the death of the assured by a judicial sentence for crime, though in fact he was wholly innocent and merely the victim of mistake or miscarriage of justice, avoids the policy; or that the judgment of conviction in the criminal case is not only admissible to prove both the sanity and the guilt of the accused, but that it is conclusive evidence of both. I fully concur with counsel for the plaintiffs in error that the first question has never been directly heretofore decided. It is certainly not decided in either the Faunleroy case or the Ritter case. The first of those cases proceeds upon the admission or assumption that the assured was guilty of forgery as charged, and for which he was executed, no question being made as to his mental condition. In the latter case the question of the assured's sanity was submitted to the jury in the civil suit, and on the evidence and under the charge of the court the jury found against the policy holder. While the elaborate argument in the opinion of the Supreme Court announcing the decision in the case does not show that, if the insanity of the assured had been shown, his suicide while in that condition would not have avoided the policy, it seems to me to strongly imply that it would not.

It seems to me that the ruling of the Circuit Court can not be sustained except upon the second ground indicated above, and that the practical effect of the judgment of this court is to

set aside a general rule, which has received immemorial recognition, to the effect that "a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, can not be given in evidence in a civil action to establish the facts on which it was rendered." This is elementary. The reason of the rule, as expressed by Mr. Greenleaf, is: "If the defendant was convicted, it may have been upon the evidence of the very plaintiff or party claiming the benefit in the civil action; and if he was acquitted it may have been by collusion with the prosecutor." But beside this, and upon more general grounds, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same. "The judgment of a court of competent jurisdiction, being a public transaction rendered by public authority, is presumed to be faithfully recorded. It is therefore the only proper legal evidence of itself, and is conclusive evidence of the
.45 fact of the rendition of the judgment and of all the legal consequences resulting from that fact, whoever may be parties to the suit in which it is offered in evidence. Thus, if one indicted for an assault and battery has been acquitted and sues for malicious prosecution, the record of acquittal is evidence for the plaintiff to establish that fact, notwithstanding the parties are not the same; but if he were convicted of the offence, and then is sued in trespass for the assault, the record in the former case would not be evidence to establish the fact of the assault, for, as to matters involved in the issue, it is res inter alios acta." 1 Greenleaf's Evidence, sections 537, 538.

I am unable to see why public policy (which) not only does not forbid but seems to require the courts of public justice, at the suit of proper parties, to make new inquiry as to the guilt of one who had been criminally charged and convicted, of making an assault should forbid the making of the inquiry sought to be made in this case as to the real guilt of the assured in the matter for which he was charged, tried and executed. It seems to me that the public interest and a sound public policy give stronger support to the general rule in a case like the present than in a suit for damages by one claiming to have been assaulted by a defendant who had been convicted therefor in a criminal prosecution. In the case of Coffey v. United States, 116 U. S., 436, the parties to the civil suit were the same as the parties in the criminal ac-

tion; the subject matter was the same; the civil suit, if we may call it so, being for the recovery of a part of the punishment denounced by the penal statute against a crime charged in the criminal action. In that case the court say: "In both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts can not be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In the case of Roberts v. State, 160 N. Y., 215, the parties in the civil action were the State of New York and the claimant, being the same as the parties in the criminal action. And it is not held, as I read the decision, that the judgment of conviction in the criminal action was conclusive as to the fact of the guilt of the accused. On the contrary, the opinion asserts: "It was therefore incumbent upon him, the claimant, to establish that he was improperly convicted and imprisoned, and the amount of damages he had sustained by reason thereof. While a great volume of evidence was given upon the second question, the amount of damages, we find nothing in the record which justified the board in finding that his conviction and imprisonment were improper, but, instead, the evidence upon which he was convicted and the judgment of conviction were introduced, both of which show that his conviction was proper; the former presumptively and the latter conclusively." By this last word "conclusively" the court could not have meant that no other evidence on that subject should have been received, because if that had been their meaning, they would at once have held that the act of the Legislature which authorized the proceeding was a void act, for this act recited upon its face that the claimant had been convicted and imprisoned for the alleged crime of burglary, and no question appears to have been made either in the Act or before the Board of Claims that the conviction was not had in a court of competent jurisdiction.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Fifth Circuit.

I, J. M. McKee, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 37 pages, numbered from a to 36, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court, and dissenting of McComick, J., in the case of

S. M. and H. R. Burt,

No. 864. v.

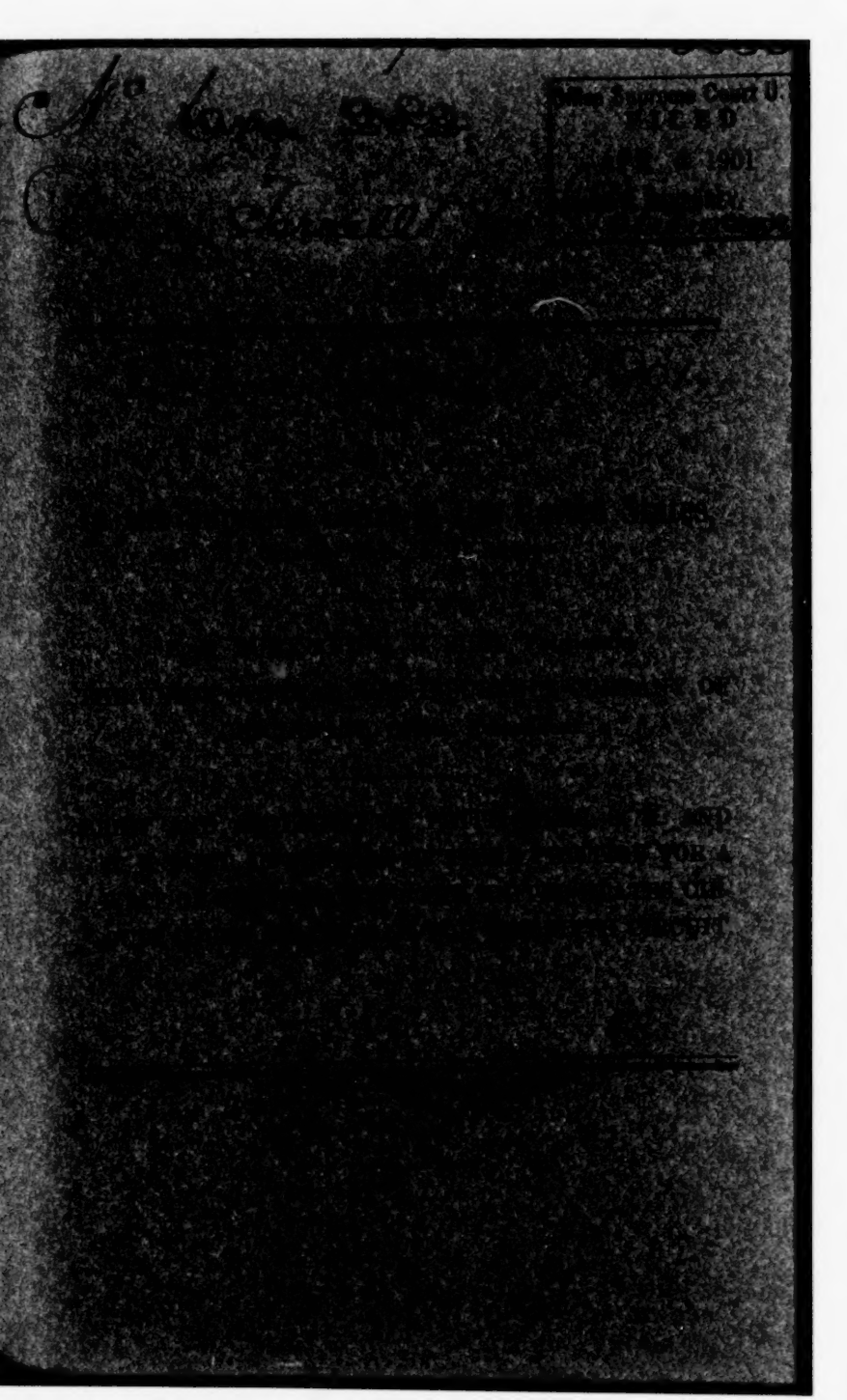
Union Central Central Life Insurance Company,

as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, this 2d day of February, A. D. 1901.

(Seal) J. M. McKEE,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.



No.....

In the Supreme Court of the United States.

October Term, A. D. 1909.

S. M. BURT AND H. R. BURT, Petitioners,

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, OHIO, Respondent.

BRIEF AND ARGUMENT OF PETITIONERS, S. M. AND H. R. BURT, IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Petitioners, under submission, respectfully ask that this brief and argument be permitted to be filed and be considered by this court in connection with this application for a writ of certiorari in this case and in support thereof.

Although two questions were considered by the Circuit Court of Appeals in its opinion, but one was apparently regarded by that court in the actual decision of the case.

While, therefore, it might be necessary to argue only one, petitioners are advised that, inasmuch as it might possibly be gathered from the opinion of the Circuit Court of Appeals that that court thought either view decisive of the case, it may be as well briefly to discuss both.

The first question, seemingly resolved by the Circuit Court of Appeals in the affirmative, was whether or not the judgment

and sentence to death of assured, William E. Burt, was conclusive in this case of the facts on which they were based.

The second question, and the one in which the Circuit Court of Appeals rested its decision, was whether or not it would be contrary to public policy to permit a recovery on the policy of insurance in controversy in this case, the assured having died at the hands of the law, by the sentence of a court of competent jurisdiction, notwithstanding he was innocent of the offense for which he was executed, the policy being silent as to the effect thereon of such death.

The Circuit Court of Appeals discussed the first question at no great length, although it intimated that there were not wanting authorities to support the proposition that such judgment would be conclusive.

However it cited only two authorities on the subject and those two do not seem to bear out the court's assertion. The first Coffey v. The United States, 116 U. S., 436, has already been adverted to in the application for certiorari. In that case it will be observed that the parties to both the criminal proceeding and the civil suit were the same and that the issues as well as the subject matter in both were practically the same; in fact, the criminal proceeding and the civil suit were but parts of the same action. The second case is Roberts v. The State of New York, 160 N. Y., 217, 224. (30 Hun. N. Y., 106.) This case was one also in which the parties as well as the issues were identical with the parties and issues in the criminal proceeding complained of, but it actually decided no more than that Roberts failed to establish by a preponderance of the evidence, the burden being on him, the injustice of the conviction which formed the basis of his civil complaint.

It is respectfully submitted, therefore, that something more in the way of authority, at least, ought to be necessary to upset the rule, which Judge McCormick, in his dissenting opinion herein, aptly observes is elementary and has prevailed from time immemorial that "a verdict and judgment in a criminal case, although admissible to establish the fact of the mere rendition of the judgment, can not be given in evidence in a civil action to establish the facts on which such judgment was rendered."

With regard to the second question, on its affirmative ans-

wer, to which, as has been said, the Circuit Court of Appeals really based its decision, petitioners, with all due respect to that learned court, are entirely unable to see wherein Fauntleroy's case resembles the case put by the court, or how its reasoning is applicable thereto.

Fauntleroy's case has been abundantly discussed in the petition for certiorari. It will be found in full in the Circuit Court of Appeals brief, Appendix A hereof, but it need hardly have been given in full, as it has recently been fully and elaborately discussed by this court in Ritter v. The Mutual Life Insurance Company of New York in 169 U. S., 139, nor is it needful to say more about it here than that, as petitioners read it, and, as it was apparently read by this court in the Ritter case, it decided no more nor less than that it would be contrary to public policy to permit recovery in the courts on a policy the time of payment of which (being its only doubtful term) the assured had rendered certain by practically taking his own life.

To say, however, that a policy of life insurance expressly agreeing that payment should be made by the company, notwithstanding the death of assured at the hands of the law, provided he were innocent of the act for which he suffered, would be void upon the plainest principles of public policy, because tending to bring the judgments of the courts into disrepute, is to assert that which may itself well be questioned; but granting it, for argument's sake, to be law, it certainly does not follow as law also that, if an innocent person suffered by miscarriage of justice, his life insurance policy is thereby in effect forfeited, upon the same principles.

The only theory on which this last proposition could possibly be supported is that the judgment and death sentence are conclusive collaterally of the facts on which they were rendered, and so, after all, in spite of language, in spite of argument, the decision in the case of the Circuit Court of Appeals is forced back upon the proposition that the judgment and death sentence of assured, William E. Burt, in the criminal case, are not only evidence, but conclusive evidence in this case; not merely evidence of their own rendition, but evidence of all the facts on which they were rendered.

If this be the law, then the decision of the Circuit Court of

Appeals ought to stand; if it is not the law, then that de
must be reversed, but, whatever the law may be, it ought
ceive the final and authoritative sanction of this court, so
put it beyond further doubt.

All these questions, or rather various phases of this qu
were rather elaborately presented to the Circuit Court of A
by petitioners in their brief and argument filed in this ca
that court, and such authorities as they were able to find
therein called to its attention, and they now take the libe
reproducing that brief in full as an appendix to this an
this court to consider it as part of this brief.

Petitioners respectfully submit that the judgment of th
cuit Court of Appeals for the Fifth Circuit, ought to be
things reversed, with such directions from this court as w
able them to have a trial upon the merits of their cause.

Counsel for Petitioners, S. M. and H. R. I

APPENDIX A.

No. 864.

United States Circuit Court of Appeals.

For the Fifth Circuit, at New Orleans, 1899.

S. M. AND H. R. BURT, Plaintiffs in Error.

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, OHIO, Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This suit was instituted December 16, 1898, in the Circuit Court of the United States, for the Western District of Texas, at Austin, by plaintiffs in error against defendant in error (Tran., p. 2), and its nature can be best presented by giving a synopsis of their first amended original petition, filed July 7, 1899, upon which the cause was disposed of in the Circuit Court.

The first paragraph appropriately avers the character, residence and citizenship of the parties. (Tran., p. 2.)

The second paragraph avers the execution and delivery, about August 1, 1894, by defendant in error, a life insurance company, to one William E. Burt, of a policy of insurance on his life (copy of which, with its conditions, was attached as Exhibit A, and will be hereinafter noticed), whereby, in consideration of the annual payment to said company, at its home office, of one hundred and fourteen dollars and seventy cents, on or before July 30 each year, at noon, for twenty years from date of policy, and payment of all notes given in payment or part payment of premiums, the company bound itself to pay to Anna M. Burt, the wife of said William E. Burt, if living, otherwise to his executors, administrators or assigns, Five Thousand Dollars, within sixty days after receipt by it of notice and satisfactory proof of said William E. Burt's death. (Tran., p. 2.)

The third paragraph avers the conveyance, by written transfer, about September 10, 1895, by said beneficiary Anna M. Burt, join

ed by her husband, said William E. Burt, to plaintiffs in error, they being then and yet creditors of said Anna M. and William E. Burt, of a one-half interest in said policy and its proceeds, whereby plaintiffs in error became, and now are, the owners of and entitled to said share. (Tran., p. 2.)

The fourth paragraph avers the death, about July 21, 1896, of said Anna M. Burt, intestate, said William E. Burt being then still alive, as well as the deaths, same day, of said Anna M. and William E. Burt's two minor female children, Agnes Lucile and Anna E. Burt (both unmarried and without issue or descendants); said two children being the only issue or descendants of the marriage of said William E. and Anna M. Burt, or of either of them. (Tran., p. 3.)

The fifth paragraph avers the conveyance, by written transfer, about February 4, 1897, from said William E. Burt, who was then the sole owner and successor to all said Anna M. Burt's rights therein, to plaintiffs in error of the remaining half interest in said policy, making them owners of the whole of it. (Tran., p. 3.)

The sixth paragraph avers that plaintiffs in error are the sole heirs at law of said William E. Burt, and, as such, are entitled to the whole of said policy and its proceeds, there being no administration on his estate, nor necessity for one. (Tran., p. 3.)

The seventh paragraph avers that said William E. Burt, having been indicted for the murder of said Anna M. Burt, was tried and convicted about November 27, 1896, in the District Court of Travis county, Texas, Twenty-sixth Judicial District, a court of competent jurisdiction, of murder in the first degree, and his punishment assessed at death although the defense of his insanity was interposed and put in issue on said trial; that about April 26, 1898, said Burt was, pursuant to said conviction, sentenced by said court to be hanged; and that on May 27, 1898, pursuant to said sentence, he was hanged by the sheriff of Travis county, Texas. (Tran., pp. 3, 4.)

The eighth paragraph alleges that, notwithstanding said conviction and sentence, said William E. Burt did not in fact commit said murder, nor participate therein, but that, if he did, his policy was not avoided thereby, because he was insane. (Tran., p. 4.)

The ninth paragraph avers due payment of premiums, except

that due July 30, 1897, and legal tender of that. (Tran., pp. 4, 5.)

The tenth paragraph avers due notice and proof of death of insured by plaintiffs in error to the company and demand for the insurance money. (Tran., p. 5.)

The eleventh paragraph avers expiration of the period of sixty days, fixed by the policy, after receipt by the company of notice and proof of death, for payment of the policy, and that the money became due August 28, 1898; also due demand for payment and company's refusal to pay. (Tran., p. 5.)

The twelfth paragraph avers the liability under the Texas statute of the company for failure, after maturity and demand, to pay the amount due, to pay to plaintiffs in error twelve per cent thereof, or six hundred dollars, additional, as damages and further their reasonable attorney's fees, which they place at $2500, because they have been forced to employ attorneys at law and counsel and take legal proceedings for collection. (Tran., pp. 5, 6.)

Prayer accordingly for judgment for debt, interest, damages, attorney's fees and general relief. (Tran., p. 6.)

EXHIBIT A.

The Union Central Life Insurance Company. No. 133,671. $5000 (amount). $114.70 (premium). Age, 26.

In consideration of the statements made in the application for this policy, which application is hereby made a part of this contract, and for the annual payment of the sum of one hundred fourteen and 70-100 dollars, at the home office of the company, on or before the 30th day of July, at noon, in every year, during the term of twenty years from date hereof, and of the payment when due of any and all notes given for premiums, or parts of same, does insure the life of William E. Burt (the insured), of Austin, in the county of Travis, in the State of Texas, in the amount of Five Thousand Dollars, without participation in profits, for the term of his natural life. Upon the death of the insured the company agrees to pay, at its home office, said amount of insurance to Anna M. Burt, his wife, if living, otherwise to the executors, administrators or assigns of the insured, within sixty days after the receipt of notice and satisfactory proof of death, the bal-

ance of the years premium, with any and all other indebtedness to the company, being first deducted. This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page hereof, which are made a part of this contract, which contract shall be held and construed to have been made in the city of Cincinnati, Ohio.

After three years premium shall have been paid on this policy, except in case of failure to pay at maturity a note given for premium or for a loan upon the security of this policy, the company will, upon legal surrender of this contract, before default of the payment of any premium, issue a paid-up, non-participating policy, payable as herein provided for the amount as named in Table A, on the following page.

In case of default in the payment of any premium after the third, except in case of failure to pay at maturity a note given for premium, or for loan upon the security of this policy, no surrender for a paid up policy having been made, as aforesaid, this policy will be continued in force only as a paid up non-participating term policy, for such time only as named in Table C on the following page. If the death of the insured occurs, while the aforesaid term policy is in force, there shall be deducted from the amount insured a sum equal to the regular annual premiums, with interest that would have accrued had this policy been kept in force, said deduction not to exceed three regular premiums with interest.

Upon legal surrender of this policy, on the 30th day of July, A. D. 1915, the company will pay in cash its entire reserved value, according to the Actuaries' Table of Mortality, with 4 per cent interest, towit: The sum of $2194, provided this policy shall not have been terminated previously by lapse, death or otherwise.

In witness whereof, the Union Central Life Insurance Company, by its President and Secretary, signs this contract, at Cincinnati, Ohio, this 1st day of August, 1895.

JOHN M. PATTISON, President.
E. P. MARSHALL, Secretary.

(Seal)

(Tran., pp. 6, 7.)

First.—The failure to pay, if living, any of the first three annual premiums, or the failure to pay notes, or interest upon notes, given to the company for any premium, on or before the days

upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance.

Second—No suit to recover on this policy shall be brought after one year from the death of the insured.

Third—If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by self-destruction, whether sane or insane, within three years from date hereof, this policy shall be null and void, and, in case of said avoidance, the reserve value only, according to the Actuaries' Table of Mortality, with four per cent interest, shall be paid on the surrender of this policy.

Except as hereinbefore provided, this policy shall be incontestable from any cause except misstatement of age. In case the age of the insured shall have been misstated, the amount payable hereunder shall be such portion of the sum insured as the premium paid bears to the required premium at the correct age of the insured. (Tran., pp. 7, 8.)

NOTICE TO POLICY HOLDER.

All payments due on this policy for premiums, or notes, or interest upon notes given to the company, are payable at the office of the company in the city of Cincinnati, or to the authorized agent of the company, on the production of the premium receipt (signed by the President or Secretary), or the note given in payment of the premium.

The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the President or Secretary of the company, whose authority for this purpose shall not be delegated.

Should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs

of interest produced with proofs of death. This company does not guarantee the validity of any assignment. (Tran., p. 8.)

Defendant in error answered by a general and special demurrer, special exception, a plea of the general issue and a special plea. (Defendant's first amended original answer, Tran., pp. 9-13.) As the case was disposed of on demurrer and exceptions, these only need be noticed.

The demurrers consisted of: (Tran., p. 9.)

First.—A general demurrer.

Second.—A special demurrer that first amended original petition of plaintiffs in error was insufficient in law to state a cause of action against defendant in error for the reason that it appeared therefrom that the insured died at the hands of the law, under judgment of a court of competent jurisdiction; and

Third.—A special exception that so much of the first amended original petition of plaintiffs in error as sought recovery of attorney's fees and twelve per cent of amount of policy, as damages, stated no valid cause of action against defendant in error, because the law of Texas, towit: Article 3071, of the Revised Civil Statutes of the State of Texas, under which said claims were asserted, was in contravention of the fourteenth amendment of the Constitution of the United States and therefore void.

On the trial, July 10, 1899, the court sustained all the general and special demurrers and exceptions, holding, in effect, as to the general and special demurrers (see bill of exceptions filed by plaintiffs in error, Tran., pp. 17, 18), that the first amended original petition was insufficient in law and showed no cause of action against defendant in error, because it appeared therefrom that the assured died at the hands of the law, having been indicted, tried, convicted and sentenced to death in a court of competent jurisdiction, of murder in the first degree, in spite of his plea (amongst others) of insanity, and pursuant to such sentence executed, notwithstanding it also appeared from said petition that assured did not commit said offense, and that, whether he did, or not, he was at the time insane, unconscious of his acts, and wholly irresponsible therefor, the court being of the opinion that, assured's sanity having been in issue in said case, his conviction, sentence and execution were conclusive as against the right of plaintiffs in error to recover in this suit, on the policy of insurance on his life in con-

troversy herein, whether he, in fact, committed or participated in the crime or not, or whether he was insane or not, when it was committed. The court also held, as to the special exception to that part of the petition claiming attorney's fees and damages, that there was no cause of action therefor, because the Texas State statute referred to under which such claim was made, was void as in contravention of the fourteenth amendment of the Constitution of the United States. (Tran., pp. 17, 18.)

These ruling disposed of the case, and plaintiffs in error declining to amend, a judgment was rendered, July 10, 1899 (Tran., pp. 12, 13), sustaining said demurrers and exceptions, dismissing the case, adjudging that plaintiffs in error take nothing by this suit, and that defendant in error go hence without day and recover its costs.

Plaintiffs in error duly excepted to this action of the court, as is shown by entry in said judgment (Tran., p. 13), and also by their bill of exceptions, duly reserved, allowed and approved, to said ruling and judgment (Tran., pp. 17-19), and assigned errors Tran., pp. 14-16) as follows:

Assignments of error (Tran., pp. 14, 16).

FIRST ASSIGNMENT OF ERROR.

That the Honorable the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Judicial District, erred in sustaining the demurrer interposed by the defendant to the first amended original petition of plaintiffs, filed in said cause on the 7th day of July, A. D. 1899, and by holding and deciding that the facts stated in the said amended original petition are not sufficient to constitute or show a cause of action in said plaintiff's favor against said defendant. (Tran., p. 14.)

SECOND ASSIGNMENT OF ERROR.

That said circuit court erred in sustaining the first ground of demurrer interposed by defendant to the first amended original petition of plaintiffs, filed July 7, A. D. 1899, and by holding, deciding and adjudging that said amended original petition does not state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant, because it appears from said petition that William E. Burt, the assured in the policy of life insurance

sued on, was indicted, tried, convicted and sentenced to death, in a court of competent jurisdiction, of the offense of murder in the first degree, and was executed in pursuance of such sentence, although it was also alleged in said petition that, notwithstanding such sentence and execution, said insured did not, in fact, commit, cause, or participate in said murder, but was at the time of its commission, and whether he committed or participated in it or not, insane, unconscious of the nature of his actions, if any, and wholly irresponsible therefor, said circuit court holding and deciding that the defence, amongst others, of insured's insanity having been in issue in said criminal cause, said conviction, sentence and execution of insured were conclusive as against plaintiffs' right to recover on the policy of insurance on his life, in controversy herein, whether insured in fact committed or participated in said crime or not, and where he was insane or not when it was committed. (Tran., pp. 14, 15.)

THIRD ASSIGNMENT OF ERROR.

The said circuit court erred in sustaining the second ground of demurrer and special exception interposed by defendant to plaintiffs' said amended original petition, filed as aforesaid, in said cause, and by holding, deciding and adjudging that said amended original petition, in so far as it seeks a recovery by plaintiffs against defendant, of the sum of twelve per cent on the amount of the policy of the life insurance sued on, as damages, and a recovery of attorney's fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant, in that behalf, because the statute, or law, of the State of Texas, towit: Article 3071 of the Revised Civil Statutes of the State of Texas, under and in virtue of which said two claims are asserted, is violative and in contravention of the fourteenth amendment to the Constitution of the United States. (Tran., p. 15.)

FOURTH ASSIGNMENT OF ERROR.

That said circuit court erred in rendering judgment against plaintiffs in said cause, sustaining said demurrers and exceptions, and dismissing plaintiffs' suit upon the pleadings in said cause, and that said judgment is contrary to law and the facts as stated in said pleadings in said cause. (Tran., pp. 15, 16.)

The first question which plaintiffs in error desire to present arises under the first and second assignments of error, and it may be stated thus:

If insured, William E. Burt, was, in fact, neither guilty of, nor a participant in, but wholly innocent of the crime for which he died at the hands of the law, or, if, notwithstanding the fact of his commission of, or participation in, the act (if it be true that he did commit or participate in it), he was insane and wholly irresponsible for his acts, when it was committed, was the policy of insurance on his life (in controversy) and his contract thereunder with the defendant company either avoided or forfeited by such death?

The contention of plaintiffs in error is that it was not, and their position may be summarized as follows:

First.—The policy being silent as to the effect of death of insured at the hands of the law, the only reason why such death could be held, on grounds of public policy, to avoid it, or work a forfeiture of rights against the company thereunder, would be that assured had by his own affirmative action broken his contract with the company, that is, had brought about or hastened his own death, instead of awaiting the probable natural period of his life, according to the tables of mortality, with reference to which alone he and the company had contracted.

Second.—Although he was tried, convicted and sentenced by a court of competent jurisdiction, and executed for the murder of his wife, the beneficiary named in the policy, nevertheless, if he was really innocent of the crime, but merely the victim of miscarriage of justice, there was no such affirmative act on his part, and no principle of public policy could be invoked against recovery on the policy of his life.

Third.—If in fact he killed his wife, still, if at the time he did it, he was insane and wholly irresponsible for his acts, his situation would be the same as if he had neither killed his wife nor had any knowledge of, or connection with, her murder.

Fourth.—The judgment and sentence of death, pronounced against him by the criminal court for murder, and his execution pursuant thereto, if admissible in evidence at all, proved nothing more than the rendition of such judgment and the fact of such execution, and were therefore immaterial in this case.

Fifth.—The judgment and sentence against insured by the criminal court were inadmissible in evidence in this cause, as being rendered in a different suit between different parties, and on a different subject matter.

Sixth.—That the insanity of insured was in issue in the criminal case is immaterial in this.

Seventh.—The judgment and sentence of insured in the criminal court, and his execution in accordance therewith, if admissible and material in this case, are prima facie evidence only, and in no manner conclusive as against the claim of plaintiffs in error herein.

FIRST PROPOSITION UNDER THESE POINTS.

The only implied understanding, or agreement, between assured and the company (the policy being silent as to the death of assured at the hands of the law) was that the assured should not intentionally or voluntarily, while of sound mind, vary the risk insured against by commission of crime, which effected such death.

AUTHORITIES.

Amicable, etc., Soc. v. Bolland (Fauntleroy's case), 1 Bligh, N. R., 194.

Ritter v. N. Y. Mut. Ins. Co., 169 U. S., 139.

Biglow v. Berkshire, Etc., Co., 93 U. S., 284.

Terry v. Ins. Co., 1 Dill. (U. S. Cir. Ct., 8th Cir.), 403.

Ins. Co. v. Terry (Id.), 15 Wallace, 580.

Mutual, Etc., Co. v. Armstrong, 117 U. S., 600.

Dean v. Am. Life Ins. Co., 4 Allen (Mass.), 96.

Breasted v. Farmers' Loan, Etc., Co., 4 Hill (N. Y.), 73.

Same Case, 8 N. Y. Rep., 279.

Supreme Commandery, Etc. v. Armstrong, 71 Alabama, 136.

Clift v. Schwabe, 3 Manning, Granger & Scott., 436-66.

Hatch v. Mutual, Etc., Co., 120 Mass., 550.

1 May on Insurance, Secs. 308 et seq.

SECOND PROPOSITION.

Although assured died at the hands of the law, nevertheless, if he was innocent, in fact, of the act for which he suffered, there

was no such voluntary or intentional variation of the risk on his part, or violation of any covenant or agreement.

AUTHORITIES.

Breasted v. Farmers' Loan, Etc., Co., 8 N. Y. Rep., 279; as well as all authorities supra, and also

Bliss on Life Insurance, Secs. 223 et seq.

2 Biddle on Insurance, Secs. 837 et seq.

2 Black on Insurance, Secs. 910 et seq.

1 May on Insurance, Secs. 326 et seq., and Sec. 310-(8).

Phillips v. Louis Eq., Etc., Co., 26 La. Ann., 401.

Connecticut, Etc., Co. v. Groom, 86 Penn. St., 92; 27 Am. Rep., 689.

Shultz v. Ins. Co., 40 Ohio Stat., 217; 48 Am. Rep., 676.

Connecticut, Etc., Co. v. Akens, 150 U. S., 468.

Robertson v. French, 14 Eng. Ruling Cases (Campbell), pp. 13 and 23.

Joyce on Insurance, Secs. 2606 et seq.

THIRD PROPOSITION.

Although he died at the hands of the law, and actually killed his wife (the act for which he suffered), yet, if he was, in fact, insane, and wholly irresponsible for his acts, at the time he killed her, there was, still, no such voluntary or intentional variation of the risk, or violation of the contract on his part, as avoided or forfeited the policy, and his situation was the same as if he had been wholly innocent of the act.

AUTHORITIES.

All authorities supra, and

Manhattan, Etc., Co. v. Broughton, 109 U. S., 121.

Accident Insurance Co. v. Crandall, 120 U. S., 527, 531-4.

Life Ins. Co. v. Terry, 15 Wallace, 586.

Horn v. The Anglo-Australian, Etc., Co., 7 Jurist N. S., 673.

Hartman v. Keystone, Etc., Co., 21 Penn. St., 466.

Phadenhauer v. Germania, Etc., Co., 7 Heisk (Tenn.), 567.

DeGogorza v. Knickerbocker, Etc., Co., 65 N. Y., 232.

1 May on Insurance, Secs. 320 et seq.

Bliss on Life Insurance, Secs. 225-38.

Van Zandt v. Mut., Etc., Co., 4 Bigelow's Life, etc., Insurance Reports, 138.

Cranster v. Conn. Ins. Co., Id., 169.

Moore v. Conn. Ins. Co., Id., 138.

Dormay v. Borradaile, 3 Id., 57.

Stormont v. Waterloo, Etc., Co., Id., 196.

Fowler v. Mut. Ins. Co., Id., 673.

Gay v. Union, Etc., Co., 2 Id., 4.

Easterbrook v. Union, Etc., Co., 1 Id., 139 (Id., 54 Maine, 224; 89 Am. Dec., 743).

St. Louis, Etc., Co. v. Graves, Id., 736.

FOURTH PROPOSITION.

The judgment and sentence of the criminal court against assured were inadmissible in evidence herein.

AUTHORITIES.

Cluff v. Mut. Ben., Etc., Co., 99 Mass., 317.

Cattingham v. Weeks, 54 Ga., 275.

Clift v. Ins. Co., 99 Mass., 317.

Black on Judgments, Secs. 535, 540, 548, 549, 610.

Teal v. Terrell, 18 Texas, 508-9.

McCamant v. Roberts, 66 Texas, 263.

Mutual Ben., Etc., Co. v. Tisdale, 91 U. S., 238.

Duchess of Kingston's case, 3 Smith's Lead. case, 1998.

FIFTH PROPOSITION.

That the fact that assured's insanity was in issue in the criminal case was immaterial and irrelevant.

AUTHORITIES.

See authorities cited under sixth and seventh propositions, infra, as well as under fourth proposition, supra.

SIXTH PROPOSITION.

The judgment and sentence of the criminal court against assured, and his execution pursuant thereto, if admissible could prove nothing more than the rendition of such judgment and sentence, and the fact of such execution.

AUTHORITIES.

Greenleaf on Evidence (Lewis' Edition), Sec. 537, and authorities there cited.

Id., Sec. 538.

Mead v. Boston, 3 Cush. (Mass.), 404.

Cluff v. Mut. Ben. Co., 99 Mass., 317.

Freeman on Judgments, Sec. 319.

SEVENTH PROPOSITION.

If said judgment, sentence and execution were admissible and material, they were prima facie evidence only, and in no manner conclusive as against the claims of plaintiffs in error herein.

AUTHORITIES.

Freman on Judgments, Sec. 319.

Bigelow on Estoppel, pp. 115 et seq.

Greenleaf on Evidence, Secs. 537 et seq.

ARGUMENT.

The precise question as to whether or not, when the policy is silent on the subject, the death of the assured in a policy of life insurance, by judicial sentence for crime, if, in fact, he was wholly innocent and merely the victim of mistake, or miscarriage of justice, of itself avoids the policy has never been directly decided. The only case in which it has been held that avoidance of the policy would result from the death of the assured at the hands of the law for crime is The Amicable Society, Etc. v. Bolland, 4 Bligh N. R., 194, 211, better known as Fauntleroy's case. This case was an action by assignees in bankruptcy to secure the amount due on a policy of insurance stipulating for the payment of a certain sum, upon the death of one Fauntleroy, to his executors, administrators or assigns. Fauntleroy was convicted of forgery (then a capital offense) and executed. The precise question in the suit, by the assignees against the company, on his policy of life insurance, was "whether the assignees as representatives of one who effects insurance on his life, and afterwards commits a capital felony, for which he is tried and executed, could recover the amount named in the policy." The Lord Chancellor (Lord Lyndhurst) delivered the opinion, and, as it is brief, it may be excus-

able to give it in full. (4 Bligh, N. R., pp. 210-212.)

"The Lord Chancellor. The circumstances of the case are shortly these: In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May, in the same year, he committed forgery on the Bank of England. He continued to pay the premiums upon this insurance for a considerable period of time. In the year 1824 he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondents. On the following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced to death, and in the month of November following was executed.

"The question under these circumstances is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the Noble Lord now present, and we have both come to the conclusion that the assignees can not maintain this suit.

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connexions? Now, if a policy of that description, with such a form of condition inserted in it in express terms, can not, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sus-

tain such a claim? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void?

"Upon this short and plain ground, therefore, independently of the more complicated arguments refered to by the counsel at the bar, in the discussion of the case, I think that this policy can not be sustained, and that the respondents are not entitled to recover. I submit, therefore, that the judgment of the court below ought, under these circumstances, to be reversed.

"Judgment reversed."

The above is the entire opinion. The facts, and all the facts, on which the case resulted in favor of respondents below, were all agreed on (4 Bligh, pp. 203-4) as follows:

"The cause being at issue, it was agreed between the respondents and the appellants that a copy of policy of insurance should be read and given in evidence on the part of the respondents on the hearing of the cause; that the respondents were the assignees of the estate and effects of Henry Fauntleroy in the policy named, under and by virtue of a commission of bankrupt, awarded and issued against Henry Fauntleroy, under which he was duly found and declared bankrupt, and his estate and effects were duly assigned to the respondents, on the 29th day of October, 1824; that Henry Fauntleroy, from the time of making the policy, up to and until the 11th day of January, 1824, or some person on his behalf, regularly paid the premiums as they became due on the policy; that the printed copies of the several charters, letters patent and bye-laws of the appellants, the Amicable Society for a Perpetual Assurance Office, should be read and given in evidence on the hearing of this cause, without further proof; that Henry Fauntleroy was convicted of felony on the 30th day of October, 1824, and was executed on the 30th day of November, 1824, in pursuance of such conviction and the judgment of death thereupon pronounced upon him; that a copy of the record of the indictment and conviction should be read and given in evidence on the hearing of the cause, without further proof, and that Henry Fauntleroy named in the indictment and conviction was the Henry Fauntleroy named in the pleadings of the cause, upon

whose life the insurance mentioned in the pleadings was effected."

The policy was silent as to the effect of the death of the assured either by suicide or at the hands of the law.

Commenting on this case, Bunyon, in his work on Life Insurance, says:

"It would render those natural affections, which make every man desirous of providing for his family, an inducement to crime, for the case may be well supposed of a person insuring his life for that purpose, with the intention of committing suicide. For a policy, moreover, to remain in force, when death arose from any such cause, would be a fraud upon the insurer, for a man's estate would thereby benefit by his own felonious act. Hence the rule of law when there is no condition whatever. But, in that case, if the suicide or self-destruction takes place when the assured is insane and not accountable for his acts, the rule arising from public policy does not apply, and his representatives are entitled to the policy money." (Bunyon, Life Ins., 3d Ed., p. 96.)

The reasoning of both Lord Lyndhurst, in Fauntleroy's case, and of Bunyon, is clearly based on the fact that the death of the assured was brought about by his own voluntary, intentional act; that is, that the assured deliberately shortened his life, or in effect committed a species of suicide, but Lord Lyndhurst does not go so far as to suggest, and the text-writer emphatically denies, that the mere fact of conviction, sentence and execution of assured at the hands of the law, would, the policy being silent, of themselves, conclusively operate an avoidance of the policy, under all circumstances. Lord Lyndhurst could not have so decided (and if he had it would have been no more than a dictum), as it was not necessary in the case before him, the entire evidence on this point being the admission of the respondents (in the agreed case) that Fauntleroy was indicted, tried and convicted of felony and pursuant to such conviction, executed. He did not so decide, for the whole tenor of his reasoning is that it is the conscious affirmative act of the insured in doing something that he knows will bring about his death, followed by his death as its direct consequence, that relieves the insurer of liability. If this be true, how then could the assured be said to have brought about his own death if he were convicted and executed, either for a crime which

he did not commit, or for an act done while insane and wholly irresponsible?

The law reads into every policy of life insurance a condition that the assured will not put a period to his own life, but it does not read into it any condition that the policy shall be void, if, without any fault on his part, he dies earlier than he and the insurer thought he would, even by judicial sentence. What has he done to break his contract, if innocent of the act for which he is hanged? What, if from insanity unconscious of its commission or its consequences?

Of course, if the policy in terms provided that it should be void if the assured should die at the hands of the law (a provision that some policies contain, just as the policy contains one rendering it void if assured should die by self-destruction, whether sane or insane), and the assured did so die, it might be that such fact would avoid the policy (the point on which it is believed the decisions in Clift v. Schwabe, and Borradaile v. Hunter, referred to infra, turned), but, if so, it would be for the reason that he liability of the insurer had been made expressly to turn on the mere happening of the event, without reference to its cause, there being no reasons of public policy why it should not have been made to turn on that, as well as on any other contingency. In other words, the insurer having expressly excepted that death from his risk, if the assured died that death, no matter how it was brought about, there might not be any liability.

Such, however, is not the case. In this case, the policy is silent, and if the death of the assured at the hands of the law can be held to have avoided the liability of the insurer, it must be because, and only because, the assured wilfully, deliberately and voluntarily shortened his natural life, with reference to which alone he and the insurer contracted, that is, of his own free will, while of sound mind, committed a crime, the punishment of which was death and followed by death. On no other grounds could reasons of public policy be invoked to avoid the liability of the insurer. Could it be possible to hold that, either if he actually had nothing to do with the commission of the crime, or if he was insane and irresponsible when he committed it, if he did commit it, and he was, nevertheless, hanged for it, his misfortune should

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operate to release the insurer? And that is precisely what is contended by defendant in error here.

These views have been endorsed by the Supreme Court of the United States, in the case of Ritter v. The Mutual Life Insurance Company of New York, decided in October, 1897 (see 169 U. S., p. 140). That case was one in which the assured having insured his life committed suicide. There was no question about the fact of his having killed himself, but his legal representative, Ritter, contended that it was done while he was insane (the policy being silent on the subject), while the company insisted that it was a deliberate and intentional act committed while assured was in sound mind. The question of assured's sanity was the only fact in issue, and upon it the court below instructed the jury substantially thus: (pp. 145 and 148.)

"If one whose life is insured intentionally kills himself when his reasoning facilities are so far impaired by insanity that he is unable to understand the moral character of his act" (which last expression the court explained), "even if he does understand its physical nature, consequence and effect, such self-destruction will not of itself prevent recovery upon the policies."

The jury found a verdict for the defendant company, upon which judgment in its favor was accordingly rendered.

Mr. Justice Harlan, who delivered the opinion of the Supreme Court, affirming this judgent, after observing (p. 148) that the case was thus placed before the jury on the single issue of the insanity of the assured at the time he committed suicide, with a direction to find for the plaintiff, if assured was then insane, but for defendant if he was then of sound mind; and that assuming that the jury obeyed the instruction of the court, their verdict must be taken as finding that the assured was not insane at the time he took his life, approves the instructions of the court below and says (p. 152):

"If a person should apply for a policy expressly providing that the company should pay the sum named, if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being of sound mind (all italics used in these extracts are ours), is is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If ex-

perience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it, upon the death of the assured, should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction while the assured was in sound mind, but only death occurring in the ordinary course of his life."

Again, after quoting certain provisions of the policy and asserting their tenor to be that "the parties did not contemplate insurance against death caused by deliberate, intentional self-destruction, when the insured was in sound mind (same page), he says (p. 153):

"These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act designed to bring about that event."

"In the case of fire insurance it is well settled that, although a policy in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the willful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply affecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators or assigns, that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event, upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract."

On page 154 he argues:

"There is another consideration that death intentionally caused by the act of the assured, when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would

attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests, or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment.

"If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators or assigns—expressly provided for the payment of the sum stipulated, when, or if, the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide, in order to make provision for those dependent upon him, or to whom he was indebted.

"Is the case any different in principle, if such policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his willful, deliberate act, when in sound mind."

After a somewhat exhaustive review of authorities (pp. 155-8), in support of the principle just announced, he continues (p. 158):

"Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It can not be in the contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk, and hasten the day of payment of the insurance money."

The learned Justice quotes nearly the whole opinion of Lord Chancellor Lyndhurst, in Fauntleroy's case (supra), and, after observing that "In support of the general proposition that the law will not enforce contracts and agreements that are against the public good, and therefore are forbidden by public policy," reference is often made to that case, proceeds (p. 158):

"The doctrine asserted in Fauntleroy's case, that death by the hands of public justice, the punishment for the commission of crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very gen-

cial introduction of the exception into policies. The same considerations and reasoning which support the doctrine seem to lead, of necessity, to the conclusion that voluntary, criminal, self-destruction, suicide, as defined at common law, should be implied as an exception to the liability of the insurer, or rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce by construction, or implication, exceptions into such contracts, which usually contain special exceptions." Again: "The fair and just interpretation of a contract of life insurance, made with assured, is that the risk of death proceeding from other causes than the voluntary act of the assured, producing or tending to produce it; and that the extinction of life by disease or by accident, not suicide, voluntary and intentional, by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit suicide."

He concludes (p. 160):

"For the reasons we have stated, it must be held that the death of the assured, Wiliam M. Runk, if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit."

Plaintiffs in error have quoted thus largely from these two cases, because Fauntleroy's case being (so far as they have been able to find) the only case ever decided as to the effect on an insurance policy of death of an assured by the sentence of the law, they desired to show just what that decision was and upon what reasoning it was founded, and, the Ritter case having been decided, upon the most nearly analogous point that they have seen, upon exactly the same reasoning, and, it may be said, upon the authority of the Fauntleroy case, they deemed it necessary, by giving, as nearly as possible, the language of Mr. Justice Harlan, to establish just how the Supreme Court of the United States understands that case and its effect.

They submit that there can not be two opinions as to the meaning of the decision in either case, and that, if there had originally been any doubt as to that of the Fauntleroy case, such doubt is entirely removed by the opinion of Mr. Justice Harlan in the Ritter case, the whole of whose reasoning, argument and citation of

authorities is to the effect, and to the effect only, that it is the intentional, voluntary death-producing act of the assured, while in sound mind, followed by his consequent death, that releases the insurer of liability; and not that assured dies, even by self-inflicted death, while insane and wholly irresponsible—much less when he is the innocent, or involuntary victim of judicial error, as in the case at bar.

The only authorities submitted by defendant in error, on the argument in the court below so far as now recalled, besides Amicable, Etc., Society v. Bolland (Fauntleroy's case), 4 Bligh N. R., p. 194, and Ritter v. The Mutual Life Insurance Co. of New York, 169 U. S., 139, were these: Supreme Commandery Knights Golden Rule v. Armstrong, 71 Alabama, 436; Clift v. Schwabe, 3 Man., Gr. and Scott, 436-66 (as reported in Bliss on Life Insurance, p. 368); Mutual Life Insurance Co. of New York v. Armstrong, 117 U. S., 600; and Hatch v. The Mutual Life Insurance Co., 126 Mass., 550.

It may not be amiss to briefly advert to these cases, in order to show just what was decided in each of them.

In Supreme Commandery Knights, Etc. v. Armstrong (71 Ala.), the assured was a member of a fraternal benefit order. His policy contained no condition of the kind, nor did any rule of the order, at time it was issued, prohibit suicide, but for some time prior to his death, a bye-law of the order had been in force (and his policy provided that it was issued subject to all rules, laws, bye-laws, etc., of the order then in force or thereafter passed) which provided that the policy should be void, if assured killed himself, whether sane or insane. Assured killed himself, and suit was brought on the policy. Defendant pleaded assured's suicide and the bye-law specially. Plaintiff demurred to this plea (1) because the bye-law being passed subsequently to issue of policy did not apply, and (2) because plea failed to show that assured wilfully suicided, its only averment being that assured came to his death by taking his own life. The demurrers were sustained by the trial court, and defendant appealed. The Supreme Court of Alabama reversed the judgment and held the plea good, saying that, if the plaintiff intended to excuse assured's act of self-destruction, because of mental unsoundness of assured, when it was committed,

he should have pleaded it by way of replication to defendant's plea.

This was all there was of the case, but in discussing it the court cited with approval Fauntleroy's case (citing also Life Ins. Co. v. Terry, 15 Wallace, 586; Horn v. The Anglo-Australian, Etc., Ins. Co., 7 Jurist N. S., 673; Hartman v. Keystone, Etc., Ins. Co. 21 Penn. St., 166; Phadenhauer v. Germania Ins. Co., 7 Heisk, 567; DeGogorza v. Knickerbocker Ins. Co. 65 N. Y., 232; and Bliss on Life Insurance, Secs. 225-238), and said, in substance, that a provision of forfeiture in case of assured taking his own life is directed against assured deliberately putting an end to his own existence, or committing any unlawful, malicious act, the consequence of which is his own death, and implies that he must be of years of discretion and in his senses, so that, if assured was not of sound mind, plaintiffs should have set that fact up, the presumption being in favor of assured's sanity." And again, "We are not aware that it has anywhere been expressly decided that voluntary self-destruction by one whose life was insured, and of whose sanity there was no question, would avoid the contract of insurance" (the Ritter case had not then been decided), "or rather, would not fall within its risk, though in that event there was not expressed an exception to the liability of the insurer. The authorities generally seem to proceed upon the tacit or expressed concession, or admission, that such is the law. (Moore v. Wolsey, 4 Ell. & Black, 243.)"

Clift v. Schwabe (3 Mann., Gr. and Scott), was a case in which the policy contained a proviso that it should be void "if assured should commit suicide, or by duelling, or by the hands of justice." Assured died in consequence of having voluntarily and for the purpose of killing himself, taken sulphuric acid, but under circumstances tending to show that he was, at the time he took the sulphric acid, of unsound mind. Charging the jury, at nisi prius, Creswell, J., said, that "in order to find the issue for the defendant it was necessary that they (the jury) should be satisfied that assured died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent; that the burden of proof, as to his dying by his own voluntary act, was on the defendant; but, that being established,

the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence." The jury having found for plaintiff, a judgment, entered accordingly, was, by bill of exception, brought into the court of Exchequer Chamber (Chief Baron Pollock and Wightman B., dissenting, and Coleridge, B., absent) reversed the judgment and ordered a new trial, four judges (all the judges delivering separate opinions) holding the above direction erroneous, "for, that the terms of the condition included all sorts of voluntary self-destruction, and, therefore, that, if assured voluntarily killed himself, it was immaterial whether he was, or was not, at the time, a responsible moral agent," the true question which should have been put to the jury according to the opinion of Patterson, B. (p. 166), being "that which was put by Erskine, J., in Borradaile v. Hunter, whether the deceased knew the probable consequences of his act, and did that voluntarily, intending such consequences to follow; and that no question should be put as to the act done being criminal or not." This case, however, it would seem, turned upon the expressed contingency of self-destruction, no matter how brought about, and in this connection the court is respectfully referred to the case of Borradaile v. Hunter, 5 Manning & Granger, 639, and also to Breasted v. The Farmers' Loan and Trust Company, opinion of Nelson, C. J., reported in 4 Hill's New York Reports, p. 73, as well as to the later opinion, in the same case, by Willard, J., reported in 8 New York Reports, p. 299. (See also 1 May on Insurance, Sec. 308, et seq.)

The Mutual Life Insurance Company of New York v. Armstrong, decided by the Supreme Court of the United States (117 U. S.), was a case which may be briefly summarized as follows: Defendant (the company) proved that Hunter (the beneficiary by assignment) murdered the assured. This is the whole case, and the late Mr. Justice Field, in a very terse opinion, said: "Hunter, the assignee of the policy, forfeited all rights under it when, to secure its immediate payment, he murdered the assured." And this short sentence is the very gist of the decision.

Finally, Hatch v. The Mutual Life Insurance Company, was a case decided by the Supreme Court of Massachusetts (120 Mass.), and holds no more than (to quote from the opinion) that "the deceased voluntarily submitted herself to an illegal operation,

with intent to cause an abortion, without any justifiable medical reason, and that the operation performed upon her was dangerous to life, and known by her to be so; and that a miscarriage was effected by the operation, from the consequences of which she died. It is, therefore, established that this voluntary act on her part, condemned alike by the laws of nature and the laws of all civilized states, and known by her to be dangerous to life, did actually result in death." For which reason the company was held not liable.

What there is in any of these cases to contradict the contention, in this case, of the plaintiffs in error; or what comfort defendant in error can find in them, if the views of plaintiffs in error, as herein expressed, regarding the Fauntleroy and Ritter case (supra) be correct, does not readily appear. In fact, plaintiffs in error contend that, if the Fauntleroy and Ritter cases had never been decided, their own position, and not that of the defendant in error, would be abundantly supported by the reasoning of these seven cases just summarized, cited by the latter.

These remarks dispose of the first, second and third propositions, or points offered by plaintiffs in error under their first and second assignments of error, and, indeed, practically dispose of the remaining four. For, conceding, for argument's sake, the admissibility in evidence here of the judgment and sentence of death pronounced against assured by the Criminal Court, and his execution in pursuance thereof, it must follow, from what has been quoted above, that such judgment and sentence and death could be no more than prima facie, and in no manner conclusive as against the claim of plaintiffs in error. That the judgment and sentence could not of themselves be conclusive hardly admits of question, for the text-writers all agree, to quote the language of Mr. Freeman in his work on Judgments, that "the record of a conviction, or of an acquittal, is not, according to a decided preponderance of authority, conclusive of the facts on which it is based in any civil action." (Freeman, Judgments, Sec. 319), and that such judgment and sentence could prove no more than their own rendition, it would seem to be only necessary to quote from Greenleaf that * * * "it is obvious that, as a general rule, a verdict and judgment in a criminal case can not be given in

evidence in a civil action to establish the facts on which it was rendered. If the defendant was convicted it may have been upon the evidence of the very plaintiff in the civil action; and, if he was acquitted, it may have been by collusion with the prosecutor. But, besides this, and upon more general grounds, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same." (Greenleaf Ev., Lewis' Ed., Sec. 537, and authorities there cited.) From which, and from the following observations from the same author (Greenleaf Ev., Sec. 538), that * * * "there is a material difference between proving the existence of the record and its tenor, and using the record as the medium of proof of the matters of fact recited in it," "for" (he continues) "the judgment is conclusive evidence of the fact of its own rendition, but, as to the matters involved in the issue, it is res inter alios acta," it would seem to follow also that, even if it were recited in it that assured's insanity was in issue and decided against him (which, of course, was not the case), and certainly notwithstanding, as is alleged, that such insanity actually was in issue, and, of course, decided adversely, nevertheless, the judgment and sentence would not be, in this case, competent even to prove such sanity, much less conclusive of it as a fact here, and so the fact that such insanity was in issue there, would be immaterial here.

It is difficult to perceive upon just what reasoning the learned district judge, who presided at circuit, based his ruling sustaining the demurrers on this ground. If he was of opinion that the judgment and sentence in the criminal case were conclusive of themselves, he is opposed to the great weight of authority, no matter what was in issue there; if he concluded that the mere death of assured at the hands of the law by judicial sentence was fatal to the claim of plaintiffs in error, his view, so far from being supported by authority, is directly opposed to the reasoning and spirit of even Fauntleroy's case, and certainly to the entire argument and opinion of the Supreme Court of the United States, as voiced by Mr. Justice Harlan in Ritter v. The Mutual Life Insurance Company of New York, supra.

Plaintiffs in error submit that both the general and special demurrers sustained by the court below on this branch of the case should have been overruled.

II.

The remaining question, which plaintiffs in error desire to present, arises under their third assignment of error, and its decision can, of course, become necessary only in event that the rulings and judgment of the court below questioned by their first and second assignments are reversed by this court.

This question is briefly: Can plaintiffs in error, if they can recover at all on the policy, claim also, in addition to the sum named in the policy, twelve per cent damages on such amount, together with all reasonable attorney's fees for the prosecution and collection of their claim, in virtue of the statute of the State of Texas authorizing such additional demand against any life or health insurance company, liable for a loss on a policy, and failing to pay same within the time specified in the policy after demand made therefor?

Plaintiffs in error contend that such recovery is permissible, and submit as a proposition hereunder:

PROPOSITION.

The Statutes of Texas, Revised Civil Statutes of Texas (1895), Title LVIII, Chapter 3, Article 3071, providing that:

"In all cases, where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss," is not in contravention of, or obnoxious to, the fourteenth amendment to the Constitution of the United States.

AUTHORITIES.

Revised Civil Statutes of Texas (1895), Title LVIII, Chapter 3, Article 307, (compare Act April 5, 1889, Sayles' Texas Civ. Stats., Supp. p. 768, Art. 4266a).

The Union Central Life Insurance Co. v. Chowning, 86 Texas, 654.

The Fidelity and Casualty Co. of New York v. Allibone, 15 Texas Civil Appeals, 178, and 90 Texas, 660.

The Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U. S., 150, and cases cited in dissenting opinion of Mr. Justice Gray.

See, also, St. Louis and San Francisco Ry. Co. v. Matthews, 165 U. S., 1.

St. Louis, Iron Mountain and Southern Ry. Co. v. Raul, 173 U. S., 404, and

Atchison, Topeka and Santa Fe Ry. Co. v. Matthews, 174 U. S., 96.

ARGUMENT.

Discussion of this question, as has already been stated in presenting the point in the brief, is only material in view of reversal of the judgment of the court below sustaining the demurrers complained of in the first and second assignments of error, and must necessarily be brief.

All that plaintiffs in error desire to observe regarding this question of their right to recover (in addition to their recovery, if any, of loss on the policy), twelve per cent damages and reasonable attorney's fees, is that this statute of the State of Texas, the precise language of which is given in the proposition above, has received the construction and approval of the Supreme Court of the State in the case of The Union Central Life Insurance Co. v. Chowning (86 Texas, 654), decided before, and of both the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the Supreme Court of Texas, in the same case of The Fidelity and Casualty Co. of N. Y. v. Allibone (15 Texas, Civ. App., 178, and 90 Texas, 660), since the decision of the case of the Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, hereinafter averted to, these Texas Courts of Appeals holding that the statute in question was not obnoxious to the fourteenth amendment to the Constitution of the United States, and that such claims for damages and reasonable attorney's fees were valid.

So far as plaintiffs in error have been able to discover, this precise statute has never received the construction of either this court or the Supreme Court of the United States, but, in criticism of it, the case of The Gulf, Colorado and Santa Fe Railway Company v. Ellis, decided by the Supreme Court of the United States (165 U. S., p. 150), is often cited. This latter was a case in which the Act of the Legislature of the State of Texas of April 5, 1889

(Sayles' Texas Civ. Stats., Supp. p. 768, Articles 1266a), was examined and declared void as in contravention of the fourteenth amendment to the Constitution of the United States. This statute provided, in substance, that any person in the State of Texas having a valid bona fide claim for personal services rendered, or labor done, or for damages, or for over-charges on freight, or claims for stock killed or injured by the trains of any railway company, provided that such claim for stock killed or injured should be presented to the agent of the company nearest to the point of such killing or injury, against any railway corporation operating a railroad in this State, such claim not exceeding $50, might present his claim, verified by his affidavit, for payment to such corporation, and, if same should not be paid within thirty days after such presentation, might institute suit thereon in the proper court, and, if he finally established his claim, and obtained judgment for its full amount, should be entitled to recover, in addition to it and costs, also all reasonable attorney's fees, provided he had an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue.

It is submitted that this decision is not decisive of the point raised in the case at bar, especially in view of the decisions of the higher courts of Texas, above quoted, on the very question in controversy. The question there decided is at best, only in a manner, analogous to the question here, and, after remarking that, as will be seen on pages 166-8, of the report, three of the justices of the Supreme Court of the United States, among whom was the Chief Justice, dissented (with a citation of authorities equal to that in the opinion of the whole court), it may suffice, in order to show upon what reasoning the decision was practically made, to quote (pp. 165, 6) the closing words of Mr. Justice Brewer, who delivered it, viz.: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it has been based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and it not a mere arbitrary selection. (The italics do not occur in the original.)

This, it would seem, would distinguish the Ellis case from the insurance cases quoted, as well as from the case at bar.

It is, therefore, submitted that the ruling of the Circuit Court sustaining the special exception of defendants in error on this point, ought also to be reversed.

As the fourth assignment of error is only in general terms and all questions arising under it have been already fully discussed, it is needless to say more regarding it than that it is, of course, insisted on.

Plaintiffs in error respectfully ask that the judgment and orders of the Circuit Court be reversed, and that the case be remanded, with such directions from this court as that a trial on the merits may be had.

GARDNER RUGGLES,
Attorney for Plaintiffs in Error.

Office Supreme Court U.S.
FILED
DEC 20 1901
JAMES H. McKENNEY,
Clerk.

No. 282. 910

Brf. of Ruggles for Petitioners.

Filed Dec. 20, 1901.

No. 282.

In the Supreme Court of the United States,

October Term, A. D. 1901.

S. M. BURT and H. R. BURT, Petitioners,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY, of Cincinnati, Ohio, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT FOR S. M. BURT AND H. R. BURT, Petitioners.

GARDNER RUGGLES,
Of Counsel with Petitioners.

Hutchings Printing Co., Austin, Texas.

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BRIEF AND ARGUMENT FOR S. M. BURT AND H. R. BURT, Petitioners.

To the Honorable the Supreme Court of the United States:

Petitioners, by their counsel, pray leave to present their view of this case as follows:

I.

STATEMENT OF THE CASE.

This action was brought originally in the District Court of Travis County, Texas, Fifty-third Judicial District, on the 26th day of October, A. D. 1898, by petitioners S. M. Burt and H. R. Burt, citizens of the State of Texas, against respondent, the Union Central Life Insurance Company of Cincinnati, Ohio, a citizen of the State of Ohio, and thereafter removed by said respondent to

the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit, on the ground solely of diversity of citizenship between petitioners, plaintiffs in said cause, on the one hand, and respondent, defendant therein, on the other, which gave said Circuit Court jurisdiction of the cause. Respondent thereafter, on the 16th day of December, A. D. 1898, duly filed in said Circuit Court a copy of the record and proceedings in said cause in said State District Court, as required by law.

These proceedings do not appear in the record here for the reason that a stipulation was made between all parties and filed in said Circuit Court (Trans. pp. 18, 19), whereby, in order that the record of the cause for the United States Circuit Court of Appeals for the Fifth Circuit should not be unnecessarily encumbered, it was agreed that the transcript on error for that court should consist of copies of certain papers only, thereby excluding petitioners' original pleadings and the removal proceedings.

On the 7th day of July, A. D. 1899, petitioners, plaintiffs in said cause in said Circuit Court of the United States for the Western District of Texas, under leave of said court, filed therein their first amended original petition (Trans., pp. 2-8), a synopsis of which will give fully the nature of their case.

The first paragraph of said amended petition appropriately avers the character, residence and citizenship of the parties. (Trans., p. 2.)

The second paragraph avers the execution and delivery, about August 1, 1894, by defendant, a life insurance company, to one William E. Burt, of a policy of insurance on his life (copy of which, with its conditions, was attached as Exhibit A, and will be hereinafter noticed), whereby, in consideration of the annual payment to said company, at its home office, of one hundred and fourteen dollars and seventy cents, on or before July 30 of each year, at noon, for twenty years from date of policy, and payment of all notes given in payment or part payment of premiums, the company bound itself to pay to Anna M. Burt, the wife of said William E. Burt, if living, otherwise to his executors, administrators, or assigns, Five Thousand Dollars, within sixty days after receipt by it of notice and satisfactory proof of said William E. Burt's death. (Trans., p. 2.)

The third paragraph avers the conveyance, by written transfer, about September 10, 1895, by said beneficiary Anna M. Burt, joined by her husband, said William E. Burt, to plaintiffs, they being then and yet creditors of said Anna M. and William E. Burt, of a one-half interest in said policy and its proceeds, whereby plaintiffs became, and now are, the owners of and entitled to said share. (Trans., p. 3.)

The fourth paragraph avers the death, about July 24, 1896, of said Anna M. Burt, intestate, said William E. Burt being then still alive, as well as the deaths, same day, of said Anna M. and William E. Burt's two minor female children, Agnes Lucile and Anna E. Burt (both unmarried and without issue or descendants); said two children being the only issue or descendants of the marriage of said William E. and Anna M. Burt, or of either of them. (Trans., p. 3.)

The fifth paragraph avers the conveyance, by written transfer, about February 4, 1897, from said William E. Burt, who was then the sole owner and successor to all said Anna M. Burt's rights therein, to plaintiffs of the remaining half interest in said policy, making them owners of the whole of it. (Trans., p. 3.)

The sixth paragraph avers that plaintiffs are the sole heirs at law of said William E. Burt, and, as such, are entitled to the whole of said policy and its proceeds, there being no administration on his estate, nor necessity for one. (Trans., p. 3.)

The seventh paragraph avers that said William E. Burt, having been indicted for the murder of said Anna M. Burt, was tried and convicted about November 27, 1896, in the District Court of Travis county, Texas, Twenty-sixth Judicial District, a court of competent jurisdiction, of murder in the first degree, and his punishment assessed at death, although the defense of his insanity was interposed and put in issue on said trial; that about April 26, 1898, said Burt was, pursuant to said conviction, sentenced by said court to be hanged; and that on May 27, 1898, pursuant to said sentence, he was hanged by the sheriff of Travis county, Texas. (Trans., pp. 3, 4.)

The eighth paragraph alleges that, notwithstanding said conviction and sentence, said William E. Burt did not in fact commit

said murder, nor participate therein, but that, if he did, his policy was not avoided thereby, because he was insane. (Trans., p. 4.)

The ninth paragraph avers due payment of premiums, except that due July 30, 1897, and legal tender of that. (Trans., p. 4.)

The tenth paragraph avers due notice and proof of death of insured by plaintiffs to the company and demand for the insurance money. (Trans., p. 5.)

The eleventh paragraph avers expiration of the period of sixty days, fixed by the policy, after receipt by the company of notice and proof of death, for payment of the policy, and that the money became due August 28, 1898; also due demand for payment and company's refusal to pay. (Trans., p. 5.)

The twelfth paragraph avers the liability under the Texas statute of the company for failure, after maturity and demand, to pay the amount due, to pay to plaintiffs twelve per cent thereof, or six hundred dollars, additional, as damages and further their reasonable attorney's fees, which they place at $2,500, because they have been forced to employ attorneys at law and counsel and take legal proceedings for collection. (Trans., p. 5.)

Prayer accordingly for judgment for debt, interest, damages, attorney's fees and general relief. (Trans., pp. 5 and 6.)

To this petition, as part thereof, was attached the following:

EXHIBIT A.

The Union Central Life Insurance Company. No. 133,671. $5000 (amount). $114.70 (premium). Age 26.

In consideration of the statements made in the application for this policy, which application is hereby made a part of this contract, and of the annual payment of the sum of one hundred fourteen and 70-100 dollars, at the home office of the company, on or before the 30th day of July, at noon, in every year, during the term of twenty years from date hereof, and of the payment when due of any and all notes given for premiums, or parts of same, does insure the life of William E. Burt (the insured), of Austin, in the county of Travis, in the State of Texas, in the amount of Five Thousand Dollars, without participation in profits, for the term of his natural life. Upon the death of the insured the company agrees to pay, at its home office, said amount of in-

surance to Anna M. Burt, his wife, if living, otherwise to the executors, administrators or assigns of the insured, within sixty days after the receipt of notice and satisfactory proof of death, the balance of the year's premium, with any and all other indebtedness to the company, being first deducted. This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page hereof, which are made a part of this contract, which contract shall be held and construed to have been made in the city of Cincinnati, Ohio.

After three years premiums shall have been paid on this policy, except in case of failure to pay at maturity a note given for premium or for a loan upon the security of this policy, the company will, upon legal surrender of this contract, before default of the payment of any premium, issue a paid-up, non-participating policy, payable as herein provided for the amount as named in Table A, on the following page.

In case of default in the payment of any premium after the third, except in case of failure to pay at maturity a note given for premium, or for loan upon the security of this policy, no surrender for a paid up policy having been made, as aforesaid, this policy will be continued in force only as a paid up, non-participating term policy, for such time only as named in Table C, on the following page. If the death of the insured occurs, while the aforesaid term policy is in force, there shall be deducted from the amount insured a sum equal to the regular annual premiums, with interest that would have accrued had this policy been kept in force, said deduction not to exceed three regular premiums with interest.

Upon legal surrender of this policy, on the 30th day of July, A. D. 1915, the company will pay in cash its entire reserved value, according to the Actuaries' Table of Mortality, with 4 per cent. interest, towit: The sum of $2194, provided this policy shall not have been terminated previously by lapse, death or otherwise.

In witness whereof, the Union Central Life Insurance Company by its President and Secretary, signs this contract, at Cincinnati, Ohio, this 1st day of August, 1895.

JOHN M. PATTISON, President.

(Seal) E. P. MARSHALL, Secretary.

(Trans., pp. 6, 7.)

CONDITIONS.

First.—The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes, given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance.

Second—No suit to recover on this policy shall be brought after one year from the death of the insured.

Third—If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by self-destruction, whether sane or insane, within three years from date hereof, this policy shall be null and void, and, in case of said avoidance, the reserve value only, according to the Actuaries' Table of Mortality, with 4 per cent. interest, shall be paid on the surrender of this policy.

Except as hereinbefore provided, this policy shall be incontestable from any cause except misstatement of age. In case the age of the insured shall have been misstated, the amount payable hereunder shall be such portion of the sum insured as the premium paid bears to the required premium at the correct age of the insured. (Trans., p. 7.)

NOTICE TO POLICY HOLDER.

All payments due on this policy for premiums, or notes, or interest upon notes given to the company, are payable at the office of the company in the city of Cincinnati, or to the authorized agent of the company, on the production of the premium receipt (signed by the President or Secretary), or the note given in payment of the premium.

The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under

it waived, save by an agreement in writing signed by the President or Secretary of the company, whose authority for this purpose shall not be delegated.

Should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest produced with proofs of death. This company does not guarantee the validity of any assignment. (Trans., pp. 7 and 8.)

On said 7th day of July, 1899, respondent, defendant in said Circuit Court, filed therein in said cause a general and special demurrer, special exception, a plea of the general issue and a special plea. (Defendant's first amended original answer, Trans., pp. 8-11.) As the case was disposed of on demurrer and exceptions, these only need be noticed.

The demurrers consisted of: (Trans., p. 8.)

First—A general demurrer.

Second—A special demurrer that first amended original petition of plaintiffs was insufficient in law to state a cause of action against defendant for the reason that it appeared therefrom that the insured died at the hands of the law, under judgment of a court of competent jurisdiction; and.

Third—A special exception that so much of the first amended original petition of plaintiffs as sought recovery of attorney's fees and twelve per cent. of amount of policy, as damages, stated no valid cause of action against defendant, because the law of Texas, towit: Article 3071, of the Revised Civil Statutes of the State of Texas, under which said claims were asserted, was in contravention of the fourteenth amendment of the Constitution of the United States and therefore void.

On the trial of said cause in said Circuit Court, July 10, 1899, the court sustained all the general and special demurrers and exceptions, holding, in effect, as to the general and special demurrers (see bill of exceptions filed by plaintiffs, Trans., pp. 15, 16), that the first amended original petition was insufficient in law and showed no cause of action against defendant, because it appeared therefrom that the assured died at the hands of the law, having

been indicted, tried, convicted and sentenced to death in a court of competent jurisdiction, of murder in the first degree, in spite of his plea (amongst others) of insanity, and pursuant to such sentence executed, notwithstanding it also appeared from said petition that assured did not commit said offense, and that, whether he did, or not, he was at the time insane, unconscious of his acts, and wholly irresponsible therefor, the court being of the opinion that, assured's sanity having been in issue in said criminal case, his conviction, sentence and execution were conclusive as against the right of plaintiffs to recover in said suit in said Circuit Court on the policy of insurance on his life in controversy therein, whether he, in fact, committed or participated in the crime or not, or whether he was insane or not, when it was committed. The court also held, as to the special exception to that part of the petition claiming attorney's fees and damages, that there was no cause of action therefor, because the Texas State statute referred to under which such claim was made, was void as in contravention of the fourteenth amendment of the Constitution of the United States. (Trans., pp. 15, 16.)

These rulings disposed of the case, and plaintiffs, declining to amend, a judgment was rendered by said Circuit Court, July 1st, 1899 (Trans., pp. 11, 12), sustaining said demurrers and exceptions, dismissing the case, adjudging that plaintiffs take nothing by their suit, and that defendant go thence without day and recover its costs.

Plaintiffs duly excepted to this action of the Circuit Court, as is shown by entry in said judgment (Trans., p. 12), and also by their bill of exceptions, duly reserved, allowed and approved, to said ruling and judgment (Trans., pp. 12-13), and assigned errors in said Circuit Court (Trans., pp. 13, 14) as follows:

FIRST ASSIGNMENT OF ERROR.

That the Honorable the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Judicial Circuit, erred in sustaining the demurrer interposed by the defendant to the first amended original petition of plaintiffs, filed in said cause on the 5th day of July, A. D. 1899, and by holding and deciding that the facts stated in the said amended original petition are not

sufficient to constitute or show a cause of action in said plaintiffs favor against said defendant. (Trans., p. 13.)

SECOND ASSIGNMENT OF ERROR.

That said Circuit Court erred in sustaining the first ground of demurrer interposed by defendant to the first amended original petition of plaintiffs, filed July 7, A. D. 1899, and by holding, deciding and adjudging that said amended original petition does not state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant, because it appears from said petition that William E. Burt, the assured in the policy of life insurance, sued on, was indicted, tried, convicted and sentenced to death, in a court of competent jurisdiction, of the offense of murder in the first degree, and was executed in pursuance of such sentence, although it was also alleged in said petition that, notwithstanding such sentence and execution, said insured did not, in fact, commit, cause, or participate in said murder, but was, at the time of its commission, and whether he committed or participated in it or not, insane, unconscious of the nature of his actions, if any, and wholly irresponsible therefor, said Circuit Court holding and deciding that the defence, amongst others, of insured's insanity having been in issue in said criminal cause, said conviction, sentence and execution of insured were conclusive as against plaintiffs' right to recover on the policy of insurance on his life, in controversy herein, whether insured in fact committed or participated in said crime or not, and whether he was insane or not when it was committed. (Trans., p. 13.)

THIRD ASSIGNMENT OR ERROR.

The said Circuit Court erred in sustaining the second ground of demurrer and special exception interposed by defendant to plaintiffs' said amended original petition, filed as aforesaid, in said cause, and by holding, deciding and adjudging that said amended original petition, in so far as it seeks a recovery by plaintiffs against defendant, of the sum of twelve per cent. on the amount of the policy of the life insurance sued on, as damages, and a recovery of attorney's fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant, in that

behalf, because the statute, or law, of the State of Texas, towit: Article 3071 of the Revised Civil Statutes of the State of Texas, under and in virtue of which said two claims are asserted, is violative and in contravention of the fourteenth amendment to the Constitution of the United States. (Trans., p. 14.)

FOURTH ASSIGNMENT OF ERROR.

That said Circuit Court erred in rendering judgment against plaintiffs in said cause, sustaining said demurrers and exceptions, and dismissing plaintiffs' suit upon the pleadings in said cause, and that said judgment is contrary to law and the facts as stated in said pleadings in said cause. (Trans., p. 14.)

On the said 10th day of July, 1899, petitioners filed in said Circuit Court of the United States for the Western District of Texas, their petition for writ of error in said cause from the United States Circuit Court of Appeals for the Fifth Circuit to said Circuit Court, and said petition was granted same day (Trans., p. 12). Thereupon they filed their writ of error bond and same was approved same day, July 10, 1899. (Trans., pp. 14, 15.)

Petitioners had, previously, on same day, filed their bills of exception to the rulings of said Circuit Court in sustaining defendant's general demurrer and exceptions to their said amended original petition, and also to its judgment in favor of defendant in said cause (Trans., pp. 15, 16) and same was approved by said court same day (Trans., p. 17). The stipulation, heretofore adverted to, prescribing what should constitute the record on error in said Circuit Court of Appeals, was made and filed also on July 10, 1899 (Trans., p. 18), and same day, writ of error issued, as petitioners had prayed, from the said Circuit Court of Appeals to said Circuit Court, defendant waiving issue of said writ and accepting service thereof. (Trans., pp. 17, 18.)

The record of said cause, as agreed, having been duly filed in said Circuit Court of Appeals by petitioners, said cause was duly submitted to said court, at its November term 1899, on the 25th day of April, 1900, on briefs and argument of counsel for both parties. (Trans., p. 19.)

Thereafter, at the November term A. D. 1900, of said Circuit

Court of Appeals, on the 4th day of December, 1900, a judgment was rendered by said court in said cause in all things affirming the aforesaid judgment of said Circuit Court therein, and adjudging that petitioners and the sureties on their writ of error bond therein, George W. Littlefield and William R. Hamby, pay all costs of said Circuit Court of Appeals in said cause. (Trans., pp. 19, 20.)

A petition for rehearing, duly certified by counsel, was filed by petitioners in said Circuit Court of Appeals, in said cause. (Trans., pp. 20, 21) and was by said court denied (Trans., p. 21), on the 15th day of January, 1900. This petition was as follows:

PETITION FOR REHEARING BY PLAINTIFFS IN ERROR.

To the Honorable, the United States Circuit Court of Appeals, for the Fifth Circuit:

Your petitioners, plaintiffs in error in the above numbered and entitled cause, having carefully examined the opinion therein of this Honorable Court, think, and respectfully submit, that, with propriety, they may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to plaintiffs in error, on the following grounds, on which it is respectfully submitted that this court was in error in said opinion, towit:

First—That, while a contract of life insurance in terms payable, notwithstanding the death of the assured at the hands of the law, as the result of capital conviction in the established courts of competent jurisdiction, in event such conviction should be unjust or unwarranted by the evidence, might and probably would be void, as being against public policy, the mere fact of the death of assured at the hands of the law as the result of such capital conviction, if he were in fact innocent (that is, either did not commit the crime or was insane when it was committed), would not avoid a contract of insurance otherwise valid.

Second—That the judgment and sentence to death of assured in a court of competent jurisdiction was admissible only because pleaded by plaintiffs in error, and even then could only establish the fact of its own rendition, and was neither admissible nor con-

clusive to establish the facts on which it was rendered, nor any of such facts, nor was it an adjudication of such matters as to be within any of the rules relating to *res adjudicata*.

Third—That liability of defendant in error on the policy of life insurance in controversy, same being originally a valid contract, could only be avoided by some *subsequent* act of the assured operating a *forfeiture*, and to effect such *forfeiture* assured must either have done some act expressly or impliedly forbidden, or omitted some duty expressly or impliedly required, by the contract. There is no omission of duty involved, and his sentence and death at the hands of the law furnished no such act, if in fact he was either innocent or insane at the time of the commission of the act for which he was convicted and executed.

Finally, plaintiffs in error respectfully suggest that this court again consider the points taken in their brief filed herein to the effect that, the policy of insurance in controversy being silent thereon, the death of the assured William E. Burt at the hands of the law as the result of the judgment and sentence of death pronounced upon him by the District Court of Travis county, Texas, did not and could not preclude a recovery on said policy by plaintiffs in error, if in fact said Burt was either innocent of the crime for which he was convicted or insane at the time of its commission, if he did actually commit it.

Wherefore, upon the foregoing grounds, these plaintiffs in error respectfully pray this Honorable Court to grant them a rehearing of said case.

GARDNER RUGGLES,

Attorney and Counsel for Plaintiffs in Error, S. M. and H. R. Burt.

I, Gardner Ruggles, attorney and counsel for the plaintiffs in error herein, S. M. and H. R. Burt, do hereby certify that, in my judgment, the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

GARDNER RUGGLES.

Austin, Texas, December 21, 1900.

Petitioners thereupon applied to this court for a writ of *certiorari* to said United States Circuit Court of Appeals for the Fifth Circuit to bring up the record and proceedings in said cause in said Circuit Court of Appeals to this court for revisal or reversal, and this application was granted by this court and said writ issued April 23, 1901. (Trans., pp. 29, 30.)

II.

BRIEF AND ARGUMENT.

In said Circuit Court of Appeals as well as in said Circuit Court petitioners stated that in the case were but two questions. The first arising under their first and second assignments of error and the second under their third assignment. These two questions they again present here:

First—If insured, William E. Burt, was, in fact, neither guilty of, nor a participant in, but wholly innocent of, the crime for which he died at the hands of the law, or, if, notwithstanding the fact of his commission of, or participation in, the act (if it be true that he did commit or participate in it), he was insane and wholly irresponsible for his acts, when it was committed, was the policy of insurance on his life (in controversy) and his contract thereunder with the defendant company either avoided or forfeited by such death? and

Second—Can plaintiffs, if they can recover at all on the policy, claim also, in addition to the sum named in the policy, twelve per cent. damages on such amount, together with all reasonable attorney's fees for the prosecution and collection of their claim, in virtue of the statute of the State of Texas authorizing such additional demand against any life or health insurance company, liable for a loss on a policy, and failing to pay same within the time specified in the policy after demand made therefor, suit for collection being necessary?

The decision of this last question by said Circuit Court of Appeals became, and its decision by this court can become, necessary, of course, only in event that the first question had been by said Circuit Court of Appeals, or is by this court, resolved in the negative.

1.

In both the trial court and the Circuit Court of Appeals, petitioners summarized their position on the first question, and again state it here, as follows:

First—The policy being silent as to the effect of death of insured at the hands of the law, the only reason why such death could be held, on grounds of public policy, to avoid it, or work a forfeiture of rights against the company thereunder, would be that assured had by his own affirmative action broken his contract with the company, that is, had brought about or hastened his own death, instead of awaiting the probable natural period of his life, according to the tables of mortality, with reference to which alone he and the company had contracted.

Second—Although he was tried, convicted and sentenced by a court of competent jurisdiction, and executed for the murder of his wife, the beneficiary named in the policy, nevertheless, if he was really innocent of the crime, but merely the victim of miscarriage of justice, there was no such affirmative act on his part, and no principle of public policy could be invoked against recovery on the policy of insurance on his life.

Third—If in fact he killed his wife, still, if at the time he did it, he was insane and wholly irresponsible for his acts, his situation would be the same as if he had neither killed his wife nor had any knowledge of, or connection with, her murder.

Fourth—The judgment and sentence of death, pronounced against him by the Criminal Court for murder, and his execution pursuant thereto, if admissible in evidence at all, proved nothing more than the rendition of such judgment and the fact of such execution, and were therefore immaterial in this case.

Fifth—The judgment and sentence against insured by the Criminal Court were inadmissible in evidence in this cause, as being rendered in a different suit between different parties, and on a different subject matter.

Sixth—That the insanity of insured was in issue in the criminal case is immaterial in this.

Seventh—The judgment and sentence of insured in the crim-

inal court, and his execution in accordance therewith, if admissible and material in this case, are prima facie evidence only, and in no manner conclusive as against the claim of plaintiffs herein.

Upon these points, petitioners submitted to said Circuit Court and said Circuit Court of Appeals, and now submit to this court, seven propositions, each with a citation of authorities, which they conceive to be in support thereof, as follows:

FIRST PROPOSITION UNDER THESE POINTS.

The only implied understanding, or agreement, between assured and the company (the policy being silent as to the death of assured at the hands of the law) was that the assured should not intentionally, or voluntarily, while of sound mind, vary the risk insured against by commission of crime, which effected such death.

AUTHORITIES.

Amicable, etc., Soc. v. Bolland (Fauntleroy's case), 4 Bligh, N. R., 194.

Ritter v. N. Y. Mut. Ins. Co., 169 U. S., 139.

Bigelow v. Berkshire, etc., Co., 93 U. S., 284.

Terry v. Ins. Co., 4 Dill. (U. S. Cir. Ct., 8th Cir.), 103.

Ins. Co. v. Terry (Id), 15 Wallace, 580.

Mutual, etc., Co. v. Armstrong, 117 U. S., 600.

Dean v. Am. Life Ins. Co., 4 Allen (Mass.), 96.

Breasted v. Farmers' Loan, etc., Co., 4 Hill (N. Y.), 73.

Same case, 8 N. Y. Rep., 279.

Supreme Commandery, etc., v. Armstrong, 74 Alabama, 136.

Clift v. Schwabe, 3 Manning, Granger & Scott, 436-66.

Hatch v. Mutual, etc., Co., 120 Mass., 550.

1 May on Insurance, Secs. 308 et seq.

SECOND PROPOSITION.

Although assured died at the hands of the law, nevertheless, if he was innocent, in fact, of the act for which he suffered, there was no such voluntary or intentional variation of the risk on his part, or violation of any covenant or agreement.

AUTHORITIES.

Breasted v. Farmers' Loan, Etc., Co., 8 N. Y. Rep., 279; as well as all authorities supra, and also

Bliss on Life Insurance, Secs. 223 et seq.

2 Biddle on Insurance, Secs. 837 et seq.

2 Black on Insurance, Secs. 910 et seq.

1 May on Insurance, Secs. 326 et seq.; and Sec. 310-(8).

Phillips v. Louis Eq., Etc., Co., 26 La. Ann., 404.

Connecticut, Etc., Co. v. Groom, 86 Penn. St., 92; 27 Am. Rep., 689.

Shultz v. Ins. Co., 40 Ohio State, 217; 48 Am. Rep., 676.

Connecticut, Etc., Co. v. Akens, 150 U. S., 468.

Robertson v. French, 14 Eng. Ruling Cases (Campbell), pp. 13 and 23.

Joyce on Insurance, Secs. 2606 et seq.

THIRD PROPOSITION.

Although he died at the hands of the law, and actually killed his wife (the act for which he suffered), yet, if he was, in fact, insane, and wholly irresponsible for his acts, at the time he killed her, there was, still, no such voluntary or intentional variation of the risk, or violation of the contract on his part, as avoided or forfeited the policy, and his situation was the same as if he had been wholly innocent of the act.

AUTHORITIES.

All authorities supra, and

Manhattan, Etc., Co. v. Broughton, 109 U. S., 121.

Accident Insurance Co. v. Crandall, 120 U. S., 527, 531-4.

Life Ins. Co. v. Terry, 15 Wallace, 586.

Horn v. The Anglo-Australian, Etc., Co., 7 Jurist N. S., 673.

Hartman v. Keystone, Etc., Co., 21 Penn. St., 466.

Phadenhauer v. Germania, Etc., Co., 7 Heisk (Tenn.), 567.

DeGogorza v. Knickerbocker, Etc., Co., 65 N. Y., 232.

1 May on Insurance, Secs. 320 et seq.

Bliss on Life Insurance, Secs. 225-38.

Van Zandt v. Mut., Etc., Co., 1 Bigelow's Life, etc., Insurance Reports, 138.

Cranston v. Comm. Ins. Co., Id., 169.
Moore v. Comm. Ins. Co., Id., 138.
Dormay v. Borradaile, 3 Id., 57.
Stormont v. Waterloo, Etc., Co., Id., 196.
Fowler v. Mut. Ins. Co., Id., 673.
Gay v. Union, Etc., Co., 2 Id., 4.
Easterbrook v. Union Etc., Co., 1 Id., 139 (Id., 54 Maine, 224; 89 Am. Dec., 743).
St. Louis, Etc., Co. v. Graves, Id., 736.

FOURTH PROPOSITION.

The judgment and sentence of the Criminal Court against assured were inadmissible in evidence herein.

AUTHORITIES.

Cluff v. Mut. Ben., Etc., Co., 99 Mass., 317.
Cattingham v. Weeks, 54 Ga., 275.
Chiff v. Ins. Co., 99 Mass., 317.
Black on Judgments, Secs. 535, 540, 548, 549, 610.
Teal v. Terrell, 18 Texas, 508-9.
McCamant v. Roberts, 66 Texas, 263.
Mutual Ben., Etc., Co. v. Tisdale, 91 U. S., 238.
Duchess of Kingston's case, 3 Smith's Lead. case, 1998.

FIFTH PROPOSITION.

That the fact that assured's insanity was in issue in the criminal case was immaterial and irrelevant.

AUTHORITIES.

See authorities cited under sixth and seventh propositions, *infra*, as well as under fourth proposition, *supra*.

SIXTH PROPOSITION.

The judgment and sentence of the Criminal Court against assured, and his execution pursuant thereto, it admissible, could prove nothing more than the rendition of such judgment and sentence, and the fact of such execution.

AUTHORITIES.

Greenleaf on Evidence (Lewis' Edition), Sec. 537, and authorities there cited.

Id., Sec. 538.

Mead v. Boston, 3 Cush. (Mass.), 404.

Cluff v. Mut. Ben. Co., 99 Mass., 317.

Freeman on Judgments, Sec. 319.

SEVENTH PROPOSITION.

If said judgment, sentence and execution were admissible and material, they were prima facie evidence only, and in no manner conclusive as against the claims of plaintiffs herein.

AUTHORITIES.

Freeman on Judgments, Sec. 319.

Bigelow on Estoppel, pp. 115 et seq.

Greenleaf on Evidence, Secs. 537 et seq.

It will, of course, be claimed here, as it was claimed in both the lower courts, on the part of respondent:

(a) That the judgment and sentence in the District Court of Travis county, Texas, against assured, William E. Burt, in the murder case, was conclusive of his guilt as against the beneficiaries in his life insurance policy in this case.

(b) That, if the policy had contained an expressed condition that payment should be made by the company, notwithstanding the death of assured at the hands of the law, provided he was in fact innocent of the crime for which he was convicted and executed, or, insane and wholly irresponsible at the time of its commission, if he did commit it, such condition would be void as being against public policy, and that, therefore, the policy being silent on the subject, if he were convicted of the crime, as he was, and executed for it, his beneficiaries could not recover on his policy of life insurance, notwithstanding his actual innocence of the crime for which he suffered, or his actual incapacity to commit it.

Petitioners, however, insist here, as they contended in both of said lower courts, that, notwithstanding the fact that assured died at the hands of the law as a result of his having been indicted, tried, convicted, and sentenced to death for murder, in and by a court of competent jurisdiction, of such offense, and the execution of such sentence, nevertheless, if insured did not in fact commit, cause or participate in, the murder for which he was so sentenced and suffered, but was wholly innocent thereof, or was, at the time of its commission, even if he in fact committed the act, insane, unconscious of the nature of his act, and wholly irresponsible, petitioners were entitled to recover upon the policy of insurance on his life, although assured's insanity had already been in issue and passed on adversely to him, in said criminal proceeding, because,

(a) The only implied understanding, or agreement, between assured and the company (the policy being silent as to the death of assured at the hands of the law) was that assured should not intentionally, or voluntarily, while of sound mind, vary the risk insured against by commission of crime, liable to effect his death.

(b) Although assured died at the hands of the law, nevertheless if in fact he was innocent of the act for which he suffered, there was no such voluntary or intentional variation of the risk on his part, or violation of any of his covenants or agreements, express or implied.

(c) Although assured died at the hands of the law, and actually killed his wife (the act for which he suffered), yet, if he was, in fact, insane and wholly irresponsible for his acts, at the time he killed her, there was still no such voluntary or intentional variation of the risk, or violation of the contract, on his part, as avoided or forfeited the policy of insurance, and his situation was the same as if in fact he had been wholly innocent of the act.

(d) The judgment and sentence of death of the Criminal Court against assured (for, amongst other reasons, want of mutuality as being *res inter alios acta*), and his execution pursuant thereto, were inadmissible in evidence in this suit, except for the fact that they were pleaded by petitioners, and being only so admissible, were evidence merely of the facts of the rendition of the judgment

and the execution of the sentence; were not evidence of any facts on which such judgment was based; were immaterial and irrelevant as to any issue herein, and, at most, were only *prima facie*, and in no manner conclusive of petitioners' right to recover on the policy.

(c) The fact that assured's insanity was in issue and passed on adversely to him in the criminal case was wholly immaterial, in any point of view, in this case.

The trial court, by its said judgment of July 10, 1899, sustaining said company's general demurrer and first exception in effect held and decided that, since it appeared from petitioners' amended petition that said assured William E. Burt was indicted, tried, convicted, and sentenced to death in a court of competent jurisdiction for the offense of murder in the first degree, and was executed pursuant to such sentence, although it likewise appeared that, notwithstanding such sentence and execution, said assured was innocent of the crime for which he suffered, either because he did not participate in it, or because at the time of its commission he was insane and wholly unconscious of and irresponsible for his acts, nevertheless assured's insanity having been, amongst other things, in issue as a defense in said criminal cause, such conviction, sentence, and execution were conclusive as against petitioners' right to recover on the policy of insurance on assured's life in controversy. In other words, that, assured, having a policy of insurance on his life, and being convicted of and executed for a crime which he did not commit, the mere fact of such conviction and execution *ipso facto* and instantly avoided the policy, and the judgment and sentence were not merely evidence of their own rendition, but also evidence and conclusive evidence herein of the facts upon which they were rendered.

The Circuit Court of Appeals in its opinion (Trans., pp. 21-25), McCormick, judge, dissenting (Trans., pp. 25-28), decided the same thing, basing its decision on the point involving assured's conviction and execution, on the supposed authority, or rather on what petitioners respectfully submit was a misapprehension, or, at least, a strained construction of, the case of The Amicable

Society v. Bolland (4 Bligh. N. R., 191, 211), better known as Fauntleroy's case, which will be given hereafter in full. This case was no more than this:

"Fauntleroy, having a policy of insurance on his life, was tried, convicted, and sentenced on October 30, 1824, and on November 30, 1824, was executed, for forgery, then a capital crime in England. On the day prior to his conviction he was duly adjudged a bankrupt and all his effects, including his insurance policy, duly assigned to appellees, Bolland et al., who sued on the policy and recovered at *nisi prius*. The entire facts were agreed on; there was no pretense but what Fauntleroy was justly and legally convicted, and, indeed, it was expressly agreed in the stipulation as to the facts on which the case was tried, that 'a copy of the record of the indictment and conviction should be read and given in evidence on the hearing of the case, without further proof,' and that Fauntleroy, the assured in the policy sued on, was the same person so indicted, convicted and executed. From the judgment in favor of Fauntleroy's trustees in bankruptcy the insurance association appealed and, delivering the opinion reversing the judgment, Lord Chancellor Lyndhurst, after stating the facts as above, said:

"The question under these circumstances is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted and finally executed, whether, under such circumstances, the parties representing him and claiming under him, can recover the sum insured in the policy so effected." * * * "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money, is it

possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crime—namely, the interest we have in the welfare and prosperity of our connexions? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that construction, which, if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void? Upon this short and plain ground, therefore" * * * "I think that this policy cannot be sustained, and that the respondents are not entitled to recover."

This Honorable Court, in the case of Ritter v. The Mutual Life Insurance Company of New York (169 U. S., 139), cited with approval the Fauntleroy case as assertive of the doctrine only that where the death of an assured is brought about by his own wilful, deliberate act, when in sound mind, there can be no recovery on the policy, observing that "death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It can not be in contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk and hasten the day of payment of the insurance money."

This decision was also called to the attention of said Circuit Court of Appeals, but that court, notwithstanding, applied the Fauntleroy case in this wise: It laid it down as a principle that, if an express condition were inserted in a policy of life insurance to the effect that it should be payable, notwithstanding the death of the insured at the hands of the law, provided he were either in fact innocent of, or insane at the time of commission of, the

offense for which he suffered, such provision would be void, as against public policy, and then held "that, if a policy with such a form of condition inserted in it in express terms cannot on grounds of public policy be sustained, a policy without such a condition cannot be enforced, on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void."

This is certainly not supported by either the Fauntleroy or the Ritter case, and, if it be conceded, for the sake of argument, that the expression of such a condition would preclude recovery on the policy, it by no means follows that, if an innocent person is executed by judicial mistake, a recovery on his policy of life insurance would thereby be precluded.

If recovery in such case is precluded at all, it must be by force of the judgment of conviction, and the only authority, in this court, at least, tending to this effect is the case of Coffey v. The United States (116 U. S., 436), cited by said Circuit Court of Appeals. But what was actually decided in that case was that, Coffey having been acquitted in a criminal case against him for a revenue offense, the judgment of acquittal was conclusive in a *qui tam* action against him for a penalty denounced against the same offense, because the punishment criminally and the penalty civilly (if it may be so termed), were both parts of the entire punishment denounced against the offense, and besides both the parties and the issues in the two cases were identical.

This disposes of the first question, but petitioners pray leave to reproduce, as appendices to this brief, their argument on this question submitted to said Circuit Court of Appeals; their argument submitted to this court in support of their petition for writ of certiorari herein; the opinion herein of said Circuit Court of Appeals for the Fifth Circuit and the dissenting opinion of McCormick, Circuit Judge (Trans., pp. 25-28), which will be found hereafter, marked, respectively, appendices A, B, C and D. Of these appendices, those marked A and B will be found also to discuss the only remaining question in the case, as aforestated, which is, restated.

2.

Can plaintiffs in error, if they can recover at all on the policy, claim also, in addition to the sum named in the policy, twelve per cent. damages on such amount, together with all reasonable attorney's fees for the prosecution and collection of their claim, in virtue of the statute of the State of Texas authorizing such additional demand against any life or health insurance company, liable for a loss on a policy, and failing to pay same within the time specified in the policy, after demand made therefor?

This statute is substantially as follows:

Article 3071, title LVIII, chapter 3, of the Revised Civil Statutes of Texas (1895). "In all cases where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

In both the trial court and the Circuit Court of Appeals this question was raised and argued, but, of course, its decision can become necessary only in event the first question above is resolved in favor of petitioners' contention.

However, it becomes necessary, petitioners conceive, to discuss this question here, because their claim is that they are entitled to recover against respondent (1) on the policy of insurance, Five Thousand Dollars, with six per cent. per annum interest, from the date (May 27, 1898) when, if at all, it became payable, and (2) respondent being a life insurance company liable therefor and having failed to pay said policy, within the time specified, and after demand made therefor; also, under said statute, in addition thereto, twelve per cent. damages on said amount as well as all reasonable attorney's fees for the prosecution and collection of such loss, their claim.

While the Circuit Court of Appeals, because probably its disposal of the first question rendered the decision of this, in its

judgment, unnecessary, did not discuss this matter at all, nevertheless that court in all things affirmed the judgment of the Circuit Court, which also sustained the demurrer and exception of respondent to that part of petitioners' petition asserting this claim, and thereby held, in effect, as did said Circuit Court, directly, that such claim was inadmissible, because said statute of Texas was obnoxious to the equality clause of the XIV amendment to the Constitution of the United States.

If this court should hold that petitioners are entitled to recover on the policy, an authoritative decision on this last question would also be necessary in order to have it ascertained, without necessity for another writ of *certiorari*, *what* they are entitled to recover.

The Circuit Court of Appeals scarcely intended, nay, it may be said, in view of its own later decision in the case of the Merchants' Life Association off the United States v. Yoakum (98 Federal Reporter, 251) *did not* intend, to declare said Texas statute unconstitutional, but the Circuit Court did so declare it, and the judgment of the Circuit Court of Appeals, affirming the Circuit Court's judgment, would in effect decide it to be obnoxious to the constitutional provision.

If, therefore, this court should reverse the judgments of both said Circuit Court and said Circuit Court of Appeals on the first question and hold that petitioners are entitled to recover on the policy, it is likely that petitioners will be put to another writ of error, or writ of *certiorari*, or both, to achieve the full measure of their recovery. But, granting that petitioners recover in both courts all they ask, nevertheless, for lack of an authoritative decision of this vexed question, by this tribunal of last resort, respondents may prosecute their writ of error, or petition for writ of certiorari, or both, in order to have that definitely settled, which petitioners submit ought to be settled by this court now.

Petitioners submitted to both said Circuit Court and said Circuit Court of Appeals, and submit to this court now, on this question, the following

PROPOSITION.

The Statute of Texas, Revised Civil Statutes of Texas (1895), Title LVIII, Chapter 3, Article 3071, providing that:

"In all cases, where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss," is not in contravention of, or obnoxious to, the fourteenth amendment to the Constitution of the United States.

They submit now, as they submitted to both lower courts, these

AUTHORITIES.

Revised Civil Statutes of Texas (1895), Title LVIII, Chapter 3, Article 3071. (Compare Act April 5, 1889, Sayles' Texas Civ. Stats. Supp. p. 768, Art. 4266a).

The Union Central Life Insurance Co. v. Chowning, 86 Texas, 654.

The Fidelity and Casualty Co. of New York v. Allibone, 15 Texas Civil Appeals, 178, and 90 Texas, 660.

The Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U. S., 150, and cases cited in dissenting opinion of Mr. Justice Gray.

See, also, St. Louis and San Francisco Ry. Co. v. Matthews, 165 U. S., 1.

St. Louis, Iron Mountain and Southern Ry. Co. v. Paul, 173 U. S., 404, and

Atchison, Topeka and Santa Fe Ry. Co. v. Matthews, 174 U. S., 96.

In both the Circuit Court and Circuit Court of Appeals on this point respondent contended, and will here contend, that said statute is obnoxious to the equality clause of the XIV amendment to the Constitution of the United States and argued that, this court (in Gulf, Colorado and Santa Fe Railway Company v. Ellis, 165 U. S., 150) held unconstitutional and void, as in contravention of said amendment, the act of the Legislature of Texas

of April 5, 1889, (Sayles' Texas Civil Statutes, Supplement, p. 768, article 1226a) which, in substance, provided that "any person in the State of Texas having a valid *bona fide* claim for personal services rendered, or labor done, or for damages, or for over charges on freight, or claims for stock killed or injured by the trains of any railway company, provided that such claim for stock killed or injured should be presented to the agent of the company nearest to the point of such killing or injury, against any railway corporation operating a railroad in this State, such claim, not exceeding $50, might present his claim, verified by his affidavit, for payment to such corporation, and, if same should not be paid within thirty days after such presentation, might institute suit thereon in the proper court, and, if he finally established his claim, and obtained judgment for its full amount, should be entitled to recover, in addition to it and costs, also all reasonable attorney's fees, provided he had an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the same, and that, the same principle applying in this case as in that, the statute in controversy must be likewise void.

As against this contention, petitioners argued and claimed, and again insist here, that the Supreme Court of Texas, in Union Central Life Insurance Company v. Chowning, 86 Texas, 654, decided before, and in The Fidelity and Casualty Company of New York v. Allibone, 90 Texas, 660, decided since, the Ellis case, had held this identical statute not obnoxious to said amendment. Also that in the Ellis case itself, this court had held that classification, if based on some reasonable ground—some difference, bearing a just and proper relation to the attempted classification—and not being a mere arbitrary selection of one class of debtors for imposition of additional penalties for non-payment without suit, would not render the statute effecting it obnoxious to the equality clause of the said amendment.

Also that this court, in St. Louis, Iron Mountain and Southern Railway Company v. Paul, 173 U. S., 404, had held that the Arkansas act of 1889, requiring railroad companies to pay their employes when discharged their unpaid wages then earned, without deduction, or that such wages should continue, at the same rate, until paid, not to exceed sixty days, was not violative of said

amendment, and did not deny such companies the equal protection of the laws.

Finally, that this court, in Atchison, Topeka and Santa Fe Railroad Company v. Matthews, 174 U. S. 96, had held that the Kansas statute, providing that in an action against a railroad company for damages by fire caused by operating the railroad, the plaintiff need only establish the fact that the fire complained of was caused by operating the railroad and the amount of his damages, and that such proof should be prima facie evidence of negligence on the part of the railroad, and that the plaintiff, if he recovered, should also be allowed a reasonable attorney's fee, was not in conflict with the fourteenth amendment to the Constitution of the United States, as denying the equal protection of the laws to such company, and was valid, the court observing that the equal protection of the laws guaranteed by said amendment does not forbid classification, nor does the fact of inequality produced by classification determine the unconstitutionality of the statute.

The reasonableness of the classification producing the apparent inequality is, petitioners contend, the true and sole test of the Statutes' constitutionality and as the reasonableness of this particular Statute of Texas has been very thoroughly and ably discussed by McCormick, Circuit Judge, in delivering the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in the case of the Merchants' Life Association of the United States v. Yoakum, reported in 98 Federal Reporter, pp. 251-271, petitioners need say no more on this question than refer to that opinion.

Petitioners, again asking this court to consider, in connection with the foregoing, their arguments contained in appendices A and B, respectfully submit that the two questions which have been discussed, viz:

1. Whether the indictment, trial, conviction, and sentence for a capital crime in a court of competent jurisdiction, and the execution pursuant thereto, of an innocent person who has a policy of insurance on his life, silent as to his death at the hands of the

law, will preclude any recovery by the beneficiaries on the policy. And, if such recovery may be had, then

2. Whether the law of the State of Texas (which has been heretofore set out in extenso in paragraph nineteenth hereof and need not, therefore, be repeated) viz: Article 3071, Title LVIII, Chapter 3, Revised Civil Statutes of Texas, is void as violative of the equality clause of the fourteenth amendment to the Constitution of the United States.

Ought both to be resolved by this court in the negative and that the judgments of both the Circuit Court of the United States for the Western District of Texas, and the United States Circuit Court of Appeals for the Fifth Circuit, in this cause ought to be reversed and the cause remanded, with such directions from this court as will secure them in said Circuit Court a trial of their cause on its merits.

GARDNER RUGGLES,
Of Counsel with Petitioners.

APPENDIX A.

PETITIONERS' ARGUMENT SUBMITTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ARGUMENT.

The precise question as to whether or not, when the policy is silent on the subject, the death of the assured in a policy of life insurance, by judicial sentence for crime, if, in fact, he was wholly innocent and merely the victim of mistake, or miscarriage of justice, of itself avoids the policy has never been directly decided. The only case in which it has been held that avoidance of the policy would result from the death of the assured at the hands of the law for crime is The Amicable Society, Etc., v. Boiland, 4 Bligh N. R., 194, 211, better known as Fauntleroy's case. This case was an action by assignees in bankruptcy to secure the amount due on a policy of insurance stipulating for the payment of a certain sum, upon the death of one Fauntleroy, to his executors, administrators or assigns. Fauntleroy was convicted of forgery (then a capital offense) and executed. The precise question in the suit, by the assignees against the company, on his policy of life insurance, was "whether the assignees as representatives of one who effects insurance on his life, and afterwards commits a capital felony, for which he is tried and executed, could recover the amount named in the policy." The Lord Chancellor (Lord Lyndhurst) delivered the opinion, and, as it is brief, it may be excusable to give it in full. (4 Bligh, N. R., pp. 210-212.)

"The Lord Chancellor. The circumstances of the case are shortly these: In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May in the same year, he committed forgery on the Bank of England. He continued to pay the premiums upon this insurance for a considerable period of time. In the year 1824 he was apprehended,

and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondents. On the following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced to death, and in the month of November following was executed.

"The question under these circumstances is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the Noble Lord now present, and we have both come to the conclusion that the assignees cannot maintain this suit.

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connexions? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went, at least, altogether void?

"Upon this short and plain ground, therefore, independently

of the more complicated arguments referred to by the counsel at the bar, in the discussion of the case, I think that this policy can not be sustained, and that the respondents are not entitled to recover. I submit, therefore, that the judgment of the court below ought, under these circumstances, to be reversed.

"Judgment reversed."

The above is the entire opinion. The facts, and all the facts, on which the case resulted in favor of respondents below, were all agreed on (4 Bligh, pp. 203-4) as follows:

"The cause being at issue, it was agreed between the respondents and the appellants that a copy of policy of insurance should be read and given in evidence on the part of the respondents on the hearing of the cause; that the respondents were the assignees of the estate and effects of Henry Fauntleroy in the policy named, under and by virtue of a commission of bankrupt, awarded and issued against Henry Fauntleroy, under which he was duly found and declared bankrupt, and his estate and effects were duly assigned to the respondents, on the 29th day of October, 1824; that Henry Fauntleroy, from the time of making the policy, up to and until the 11th day of January, 1824, or some person on his behalf, regularly paid the premiums as they became due on the policy; that the printed copies of the several charters, letters patent and by-laws of the appellants, the Amicable Society for a Perpetual Assurance Office, should be read and given in evidence on the hearing of this cause, without further proof; that Henry Fauntleroy was convicted of felony on the 30th day of October, 1824, and was executed on the 30th day of November, 1824, in pursuance of such conviction and the judgment of death thereupon pronounced upon him; that a copy of the record of the indictment and conviction should be read and given in evidence on the hearing of the cause, without further proof, and that Henry Fauntleroy named in the indictment and conviction was the Henry Fauntleroy named in the pleadings of the cause, upon whose life the insurance mentioned in the pleadings was effected."

The policy was silent as to the effect of the death of the assured either by suicide or at the hands of the law.

Commenting on this case, Bunyon, in his work on Life Insurance, says:

"It would render those natural affections which make every man desirous of providing for his family, an inducement to crime, for the case may be well supposed of a person insuring his life for that purpose, with the intention of committing suicide. For a policy, moreover, to remain in force, when death arose from any such cause, would be a fraud upon the insurer, for a man's estate would thereby benefit by his own felonious act. Hence the rule of law when there is no condition whatever. But, in that case, if the suicide or self-destruction takes place when the assured is insane and not accountable for his acts, the rule arising from public policy does not apply, and his representatives are entitled to the policy money." (Bunyon, Life Ins., 3d Ed., p. 96.)

The reasoning of both Lord Lyndhurst, in Fauntleroy's case, and of Bunyon, is clearly based on the fact that the death of the assured was brought about by his own voluntary, intentional act; that is, that the assured deliberately shortened his life, or in effect committed a species of suicide, but Lord Lyndhurst does not go so far as to suggest (and the text-writer emphatically denies), that the mere fact of conviction, sentence and execution of assured at the hands of the law, would, the policy being silent, of themselves, conclusively operate an avoidance of the policy, under all circumstances. Lord Lyndhurst could not have so decided (and if he had it would have been no more than a dictum), as it was not necessary in the case before him, the entire evidence on this point being the admission of the respondents (in the agreed case) that Fauntleroy was indicted, tried and convicted of felony and pursuant to such conviction, executed. He did not so decide, for the whole tenor of his reasoning is that it is the conscious affirmative act of the insured in doing something that he knows will bring about his death, followed by his death as its direct consequence, that relieves the insurer of liability. If this be true, how then could the assured be said to have brought about his own death if he were convicted and executed, either for a crime which he did not commit, or for an act done while insane and wholly irresponsible?

The law reads into every policy of life insurance a condition that the assured will not put a period to his own life, but it does not read into it any condition that the policy shall be void, if, without any fault on his part, he dies earlier than he and the insurer thought he would, even by judicial sentence. What has he done to break his contract, if innocent of the act for which he is hanged? What, if from insanity unconscious of its commission or its consequences?

Of course, if the policy in terms provided that it should be void if the assured should die at the hands of the law (a provision that some policies contain, just as this policy contains one rendering it void if assured should die by self-destruction, whether sane or insane), and the assured did so die, it might be that such fact would avoid the policy (the point on which it is believed the decisions in Clift v. Schwabe, and Borradaile v. Hunter, referred to infra, turned), but, if so, it would be for the reason that the liability of the insurer had been made expressly to turn on the mere happening of the event, without reference to its cause, there being no reasons of public policy why it should not have been made to turn on that, as well as on any other contingency. In other words, the insurer having expressly excepted that death from his risk, if the assured died that death, no matter how it was brought about, there might not be any liability.

Such, however, is not this case. In this case, the policy is silent, and if the death of the assured at the hands of the law can be held to have avoided the liability of the insurer, it must be because, and only because, the assured wilfully, deliberately and voluntarily shortened his natural life, with reference to which alone he and the insurer contracted, that is, of his own free will, while of sound mind, committed a crime, the punishment of which was death and followed by death. On no other grounds could reasons of public policy be invoked to avoid the liability of the insurer. Could it be possible to hold that, either if he actually had nothing to do with the commission of the crime, or if he was insane and irresponsible when he committed it, if he did commit it, and he was, nevertheless, hanged for it, his misfortune should operate to release the insurer? And that is precisely what is contended by defendant in error here.

These views have been indorsed by the Supreme Court of the United States, in the case of Ritter v. The Mutual Life Insurance Company of New York, decided in October, 1897 (see 169 U. S., p. 140). That case was one in which the assured having insured his life committed suicide. There was no question about the fact of his having killed himself, but his legal representative, Ritter, contended that it was done while he was insane (the policy being silent on the subject), while the company insisted that it was a deliberate and intentional act committed while assured was in sound mind. The question of assured's sanity was the only fact in issue, and upon it the court below instructed the jury substantially thus: (pp. 145 and 148.)

"If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act" (which last expression the court explained), "even if he does understand its physical nature, consequence and effect, such self-destruction will not of itself prevent recovery upon the policies."

The jury found a verdict for the defendant company, upon which judgment in its favor was accordingly rendered.

Mr. Justice Harlan, who delivered the opinion of the Supreme Court, affirming this judgment, after observing (p. 148) that the case was thus placed before the jury on the single issue of the insanity of the assured at the time he committed suicide, with a direction to find for the plaintiff, if assured was then insane, but for defendant if he was then of sound mind; and that assuming that the jury obeyed the instruction of the court, their verdict must be taken as finding that the assured was not insane at the time he took his life, approves the instructions of the court below and says (p. 152):

"If a person should apply for a policy expressly providing that the company should pay the sum named, if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being of sound mind it is reasonably certain that the application would be instantly rejected. It is impossible to

suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it, upon the death of the assured, should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction while the assured was in sound mind, but only death occurring in the ordinary course of his life."

Again, after quoting certain provisions of the policy and asserting their tenor to be that "the parties did not contemplate insurance against death caused by deliberate, intentional self-destruction, when the insured was in sound mind (same page), he says (p. 153):

"These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act designed to bring about that event."

"In the case of fire insurance it is well settled that, although a policy in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the willful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators or assigns, that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event, upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract."

On page 154 he argues:

"There is another consideration that death intentionally caused by the act of the assured, when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests, or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment.

"If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators or assigns—expressly provided for the payment of the sum stipulated, when, or if, the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide, in order to make provision for those dependent upon him, or to whom he was indebted.

"Is the case any different in principle, if such policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his willful, deliberate act, when in sound mind."

After a somewhat exhaustive review of authorities (pp. 155-8), in support of the principle just announced, he continues (p. 158):

"Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk, and hasten the day of payment of the insurance money."

The learned Justice quotes nearly the whole opinion of Lord Chancellor Lyndhurst, in Fauntleroy's case (supra), and, after ob-

serving that "In support of the general proposition that the law will not enforce contracts and agreements that are against the public good, and therefore are forbidden by public policy," reference is often made to that case, proceeds (p. 158):

"The doctrine asserted in Fauntleroy's case, that death by the hands of public justice, the punishment for the commission of crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies. The same considerations and reasoning which support the doctrine seem to lead, of necessity, to the conclusion that voluntary, criminal, self-destruction, suicide, as defined at common law, should be implied as an exception to the liability of the insurer, or rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce by construction, or implication, exceptions into such contracts, which usually contain special exceptions." Again: "The fair and just interpretation of a contract of life insurance, made with assured, is that the risk is of death proceeding from other causes than the voluntary act of the assured, producing or tending to produce it; and that the extinction of life by disease or by accident, not suicide, voluntary and intentional, by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit suicide."

He concludes (p. 160):

"For the reasons we have stated, it must be held that the death of the assured, William M. Runk, if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit."

Plaintiffs in error have quoted thus largely from these two cases, because Fauntleroy's case being (so far as they have been able to find) the only case ever decided as to the effect on an insurance policy of death of an assured by the sentence of the law, they de-

sired to show just what that decision was and upon what reasoning it was founded, and, the Ritter case having been decided, upon the most nearly analogous point that they have seen, upon exactly the same reasoning, and, it may be said, upon the authority of the Fauntleroy case, they deemed it necessary, by giving, as nearly as possible, the language of Mr. Justice Harlan, to establish just how the Supreme Court of the United States seemed to them to understand that case and its effect.

They submit that there cannot be two opinions as to the meaning of the decision in either case, and that, if there had originally been any doubt as to that of the Fauntleroy case, such doubt is entirely removed by the opinion of Mr. Justice Harlan in the Ritter case, the whole of whose reasoning, argument and citation of authorities is to the effect, and to the effect only, that it is the intentional, voluntary death-producing act of the assured, while in sound mind, followed by his consequent death, that releases the insurer of liability; and not that assured dies, even by self-inflicted death, while insane and wholly irresponsible—much less when he is the innocent, or involuntary victim of judicial error, as in the case at bar.

The only authorities submitted by defendant in error, on the argument in the court below so far as now recalled, besides Amicable, Etc., Society v. Bolland (Fauntleroy's case), 4 Bligh, N. R., p. 194, and Ritter v. The Mutual Life Insurance Co. of New York, 169 U. S., 139, were these: Supreme Commandery Knights Golden Rule v. Armstrong, 71 Alabama, 436; Clift v. Schwabe, 3 Man., Gr. and Scott, 436-66 (as reported in Bliss on Life Insurance, p. 368); Mutual Life Insurance Co. of New York v. Armstrong, 117 U. S., 600; and Hatch v. The Mutual Life Insurance Co., 120 Mass., 550.

It may not be amiss to briefly advert to these cases, in order to show just what was decided in each of them.

In Supreme Commandery Knights, Etc. v. Armstrong (71 Ala.), the assured was a member of a fraternal benefit order. His policy contained no condition of the kind, nor did any rule of the order, at time it was issued, prohibit suicide, but for some time prior to his death, a by-law of the order had been in force (and his

policy provided that it was issued subject to all rules, laws, by-laws, etc., of the order then in force or thereafter passed) which provided that the policy should be void, if assured killed himself, whether sane or insane. Assured killed himself, and suit was brought on the policy. Defendant pleaded assured's suicide and the by-law specially. Plaintiff demurred to this plea (1) because the by-law being passed subsequently to issue of policy did not apply, and (2) because plea failed to show that assured wilfully suicided, its only averment being that assured came to his death by taking his own life. The demurrers were sustained by the trial court, and defendant appealed. The Supreme Court of Alabama reversed the judgment and held the plea good, saying that, if the plaintiff intended to excuse assured's act of self-destruction, because of mental unsoundness of assured, when it was committed, he should have pleaded it by way of replication to defendant's plea.

This was all there was of the case, but in discussing it the court cited with approval Fauntleroy's case (citing also Life Ins. Co. v. Terry, 15 Wallace, 586; Horn v. The Anglo-Australian, Etc., Ins. Co., 7 Jurist N. S., 633; Hartman v. Keystone, Etc., Ins. Co., 21 Penn. St., 466; Phadenhauer v. Germania Ins. Co., 7 Heisk, 567; Deciogorza v. Knickerbocker Ins. Co., 65 N. Y., 232; and Biss on Life Insurance, Secs. 225-238), and said, in substance, that a provision of forfeiture in case of assured taking his own life is directed against assured deliberately putting an end to his own existence, or committing any unlawful, malicious act, the consequence of which is his own death, and implies that he must be of years of discretion and in his senses, so that, if assured was not of sound mind, plaintiffs should have set that fact up, the presumption being in favor of assured's sanity." And again, "We are not aware that it has anywhere been expressly decided that voluntary self-destruction by one whose life was insured, and of whose sanity there was no question, would avoid the contract of insurance" (the Ritter case had not then been decided), "or rather, would not fall within its risk, though in that event there was not expressed an exception to the liability of the insurer. The authorities generally seem to proceed upon the tacit or expressed concession, or admission, that such is the law. (Moore v. Wolsey, 4 Ell. & Black, 243.)"

Clift v. Schwabe (3 Mann., Gr. and Scott), was a case in which the policy contained a proviso that it should be void "if assured should commit suicide, or die by duelling, or at the hands of justice." Assured died in consequence of having voluntarily and for the purpose of killing himself, taken sulphuric acid, but under circumstances tending to show that he was, at the time he took the sulphuric acid, of unsound mind. Charging the jury, at nisi prius, Creswell, J., said, that "in order to find the issue for the defendant it was necessary that they (the jury) should be satisfied that assured died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent; that the burden of proof, as to his dying by his own voluntary act, was on the defendant; but, that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence." The jury having found for plaintiff, a judgment, entered accordingly, was, by bill of exception, brought into the court of Exchequer Chamber which (Chief Baron Pollock and Wightman B., dissenting, and Coleridge, B., absent) reversed the judgment and ordered a new trial, four judges (all the judges delivering separate opinions) holding the above direction erroneous, "for, that the terms of the condition included all sorts of voluntary self-destruction, and, therefore, that, if assured voluntarily killed himself, it was immaterial whether he was, or was not, at the time, a responsible moral agent," the true question which should have been put to the jury according to the opinion of Patterson, B. (p. 466), being "that which was put by Erskine, J., in Borradaile v. Hunter, whether the deceased knew the probable consequences of his act, and did that voluntarily, intending such consequences to follow; and that no question should be put as to the act done being criminal or not." This case, however, it would seem, turned upon the expressed contingency of self-destruction, no matter how brought about, and in this connection the court is respectfully referred to the case of Borradaile v. Hunter, 5 Manning & Granger, 639, and also to Breasted v. The Farmers' Loan and Trust Company, opinion of Nelson, C. J., reported in 4 Hill's New York Reports,

p. 13, as well as to the later opinion, in the same case, by Willard J., reported in 8 New York Reports, p. 299. (See also 1 May on Insurance, Sec. 308, et seq.)

The Mutual Life Insurance Company of New York v. Armstrong, decided by the Supreme Court of the United States (117 U. S.), was a case which may be briefly summarized as follows: Defendant (the company) proved that Hunter (the beneficiary by assignment) murdered the assured. This is the whole case, and the late Mr. Justice Field, in a very terse opinion, said: "Hunter, the assignee of the policy, forfeited all rights under it when, to secure its immediate payment, he murdered the assured." And this short sentence is the very gist of the decision.

Finally, Hatch v. The Mutual Life Insurance Company, was a case decided by the Supreme Court of Massachusetts (120 Mass.), and holds no more than (to quote from the opinion) that "the deceased voluntarily submitted herself to an illegal operation, with intent to cause an abortion, without any justifiable medical reason, and that the operation performed upon her was dangerous to life, and known by her to be so; and that a miscarriage was effected by the operation, from the consequences of which she died. It is, therefore, established that this voluntary act on her part, condemned alike by the laws of nature and the laws of all civilized States, and known by her to be dangerous to life, did actually result in death." For which reason the company was held not liable.

What there is in any of these cases to contradict the contention, in this case, of the plaintiffs in error; or what comfort defendant in error can find in them, if the views of plaintiffs in error, as herein expressed, regarding the Fauntleroy and Ritter cases (supra) be correct, does not readily appear. In fact, plaintiffs in error contend that, if the Fauntleroy and Ritter cases had never been decided, their own position, and not that of the defendant in error, would be abundantly supported by the reasoning of these seven cases just summarized, cited by the latter.

These remarks dispose of the first, second and third propositions, or points offered by plaintiffs in error under their first and second assignments of error, and, indeed, practically dispose of the remaining four. For, conceding, for argument's sake, the admissibility in evidence here of the judgment and sentence of death pronounced against assured by the Criminal Court, and his execution in pursuance thereof, it must follow, from what has been quoted above, that such judgment and sentence and death could be no more than prima facie, and in no manner conclusive as against the claim of plaintiffs in error. That the judgment and sentence could not of themselves be conclusive hardly admits of question, for the text-writers all agree, to quote the language of Mr. Freeman in his work on Judgments, that "the record of a conviction, or of an acquittal, is not, according to a decided preponderance of authority, conclusive of the facts on which it is based in any civil action" (Freeman, Judgments, Sec. 319), and that such judgment and sentence could prove no more than their own rendition, it would seem to be only necessary to quote from Greenleaf that * * * "it is obvious that, as a general rule, a verdict and judgment in a criminal case cannot be given in evidence in a civil action to establish the facts on which it was rendered. If the defendant was convicted it may have been upon the evidence of the very plaintiff in the civil action; and, if he was acquitted, it may have been by collusion with the prosecutor. But, besides this, and upon more general grounds, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same." (Greenleaf Ev., Lewis' Ed., Sec. 537, and authorities there cited.) From which, and from the following observations from the same author (Greenleaf Ev., Sec. 538), that * * * "there is a material difference between proving the existence of the record and its tenor, and using the record as the medium of proof of the matters of fact recited in it," "for" (he continues) "the judgment is conclusive evidence of the fact of its own rendition, but, as to the matters involved in the issue, it is *res inter alios acta*," it would seem to follow also that, even if it were recited in it that assured's insanity was in issue and decided against him (which, of course, was not the case), and certainly notwithstanding, as it alleged, that such

insanity actually was in issue, and, of course, decidedly adversely, nevertheless, the judgment and sentence would not be, in this case, competent even to prove such sanity, much less conclusive of it as a fact here, and so the fact that such insanity was in issue there, would be immaterial here.

It is difficult to perceive upon just what reasoning the learned District Judge, who presided at circuit, based his ruling sustaining the demurrers on this ground. If he was of opinion that the judgment and sentence in the criminal case were conclusive of themselves, he is opposed to the great weight of authority, no matter what was in issue there; if he concluded that the mere death of assured at the hands of the law by judicial sentence was fatal to the claim of plaintiffs in error, his view, so far from being supported by authority, is directly opposed to the reasoning and spirit of even Fauntleroy's case, and certainly to the entire argument and opinion of the Supreme Court of the United States, as voiced by Mr. Justice Harlan in Ritter v. The Mutual Life Insurance Company of New York, supra.

Plaintiffs in error submit that both the general and special demurrers sustained by the court below on this branch of the case should have been overruled.

II.

The remaining question, which plaintiffs in error desire to present, arises under their third assignment of error, and its decision can, of course, become necessary only in event that the rulings and judgment of the court below questioned by their first and second assignments are reversed by this court.

This question is briefly: Can plaintiffs in error, if they can recover at all on the policy, claim also, in addition to the sum named in the policy, twelve per cent damages on such amount, together with all reasonable attorney's fees for the prosecution and collection of their claim, in virtue of the statute of the State of Texas authorizing such additional demand against any life or health insurance company, liable for a loss on a policy, and failing to pay same within the time specified in the policy after demand made therefor?

Plaintiffs in error contend that such recovery is permissible, and submit as a proposition hereunder:

PROPOSITION.

The Statute of Texas, Revised Civil Statutes of Texas (1895), Title LVIII, Chapter 3, Article 3071, providing that:

"In all cases, where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss," is not in contravention of, or obnoxious to, the fourteenth amendment to the Constitution of the United States.

ARGUMENT.

Discussion of this question, as has already been stated in presenting the point in the brief, is only material in view of reversal of the judgment of the court below sustaining the demurrers complained of in the first and second assignments of error, and must necessarily be brief.

All that plaintiffs in error desire to observe regarding this question of their right to recover (in addition to their recovery, if any, of loss on the policy), twelve per cent. damages and reasonable attorney's fees, is that this statute of the State of Texas, the precise language of which is given in the proposition above, has received the construction and approval of the Supreme Court of the State in the case of The Union Central Life Insurance Co. v. Chowning (86 Texas, 654), decided before, and of both the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the Supreme Court of Texas, in the same case of The Fidelity and Casualty Co. of N. Y. v. Allibone (15 Texas, Civ. App., 178, and 90 Texas, 660), since the decision of the case of the Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, hereinafter adverted to, these Texas Courts of Appeal holding that the statute in question was not obnoxious to the fourteenth amendment to the Con-

stitution of the United States, and that such claims for damages and reasonable attorney's fees were valid.

So far as plaintiffs in error have been able to discover, this precise statute has never received the construction of either this court or the Supreme Court of the United States, but, in criticism of it, the case of The Gulf, Colorado and Santa Fe Railway Company v. Ellis, decided by the Supreme Court of the United States (165 U. S., p. 150), is often cited. This latter was a case in which the Act of the Legislature of the State of Texas of April 5, 1889, (Sayles' Texas Civ. Stats., Supp. p. 368, Article 4266a), was examined and declared void as in contravention of the fourteenth amendment to the Constitution of the United States. This statute provided, in substance, that any person in the State of Texas having a valid bona fide claim for personal services rendered, or labor done, or for damages, or for over-charges on freight, or claims for stock killed or injured by the trains of any railway company, provided that such claim for stock killed or injured should be presented to the agent of the company nearest to the point of such killing or injury, against any railway corporation operating a railroad in this State, such claim not exceeding $50, might present his claim, verified by his affidavit, for payment to such corporation, and, if same should not be paid within thirty days after such presentation, might institute suit thereon in the proper court, and, if he finally established his claim, and obtained judgment for its full amount, should be entitled to recover, in addition to it and costs, also all reasonable attorney's fees, provided he had an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue.

It is submitted that this decision is not decisive of the point raised in the case at bar, especially in view of the decisions of the higher courts of Texas, above quoted, on the very question in controversy. The question there decided is at best, only in a manner, analogous to the question here, and, after remarking that, as will be seen on pages 166-8, of the report, three of the justices of the Supreme Court of the United States, among whom was the Chief Justice, dissented (with a citation of authorities equal to that in the opinion of the whole court), it may suffice, in order to show upon what reasoning the decision was practically made, to quote

(pp. 165, 6) the closing words of Mr. Justice Brewer, who delivered it, viz: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it has been based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.

This, it would seem, would distinguish the Ellis case from the insurance cases quoted, as well as from the case at bar.

It is, therefore, submitted that the ruling of the Circuit Court sustaining the special exception of defendants in error on this point, ought also to be reversed.

As the fourth assignment of error is only in general terms and all questions arising under it have been already fully discussed, it is needless to say more regarding it than that it is, of course, insisted on.

Plaintiffs in error respectfully ask that the judgment and orders of the Circuit Court be reversed, and that the case be remanded, with such directions from this court as that a trial on the merits may be had.

GARDNER RUGGLES,
Attorney for Plaintiffs in Error.

APPENDIX E.

BRIEF AND ARGUMENT OF PETITIONERS, S. M. AND H. R. BURT, IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Petitioners, under submission, respectfully ask that this brief and argument be permitted to be filed and be considered by this court in connection with this application for a writ of certiorari in this case and in support thereof.

Although two questions were considered by the Circuit Court of Appeals in its opinion, but one was apparently regarded by that court in the actual decision of the case.

While, therefore, it might be necessary to argue only one, petitioners are advised that, inasmuch as it might possibly be gathered from the opinion of the Circuit Court of Appeals that that court thought either view decisive of the case, it may be as well briefly to discuss both.

The first question, seemingly resolved by the Circuit Court of Appeals in the affirmative, was whether or not the judgment and sentence to death of assured, William E. Burt, was conclusive in this case of the facts on which they were based.

The second question, and the one on which the Circuit Court of Appeals rested its decision, was whether or not it would be contrary to public policy to permit a recovery on the policy of insurance in controversy in this case, the assured having died at the hands of the law, by the sentence of a court of competent jurisdiction, notwithstanding he was innocent of the offense for which he was executed, the policy being silent as to the effect thereon of such death.

The Circuit Court of Appeals discussed the first question at no great length, although it intimated that there were not wanting authorities to support the proposition that such judgment would be conclusive.

However, it cited only two authorities on the subject and those two do not seem to bear out the court's assertion. The first, Coffey v. The United States, 116 U. S., 436, has already been adverted

to in the application for certiorari. In that case it will be observed that the parties to both the criminal proceeding and the civil suit were the same and that the issues as well as the subject matter in both were practically the same; in fact, the criminal proceeding and the civil suit were but parts of the same action. The second case is Roberts v. The State of New York, 160 N. Y., 217, 224. (30 Hun. N. Y., 106.) This case was one also in which the parties as well as the issues were identical with the parties and issues in the criminal proceeding complained of, but it actually decided no more than that Roberts failed to establish by a preponderance of the evidence, the burden being on him, the injustice of the conviction which formed the basis of his civil complaint.

It is respectfully submitted, therefore, that something more in the way of authority, at least, ought to be necessary to upset the rule, which Judge McCormick, in his dissenting opinion herein, aptly observes is elementary and has prevailed from time immemorial that "a verdict and judgment in a criminal case, although admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which such judgment was rendered."

With regard to the second question, on its affirmative answer, to which, as has been said, the Circuit Court of Appeals really based its decision, petitioners, with all due respect to that learned court, are entirely unable to see wherein Fauntleroy's case resembles the case put by the court, or how its reasoning is applicable thereto.

Fauntleroy's case has been abundantly discussed in the petition for certiorari. It will be found in full in the Circuit Court of Appeals brief, Appendix A hereof, but it need hardly have been given in full, as it has recently been fully and elaborately discussed by this court in Ritter v. The Mutual Life Insurance Company of New York in 169 U. S., 139, nor is it needful to say more about it here than fact, as petitioners read it, and, as it was apparently read by this court in the Ritter case, it decided no more nor less than that it would be contrary to public policy to permit recovery in the courts on a policy the time of payment of which (being its only doubtful term) the assured had rendered certain by practically taking his own life.

To say, however, that a policy of life insurance expressly agreeing that payment should be made by the company, notwithstanding the death of assured at the hands of the law, provided he were innocent of the act for which he suffered, would be void upon the plainest principles of public policy, because tending to bring the judgments of the courts into disrepute, is to assert that which may itself well be questioned; but granting it, for argument's sake, to be law, it certainly does not follow as law also that, if an innocent person suffers by miscarriage of justice, his life insurance policy is thereby in effect forfeited, upon the same principles.

The only theory on which this last proposition could possibly be supported is that the judgment and death sentence are conclusive collaterally of the facts on which they were rendered, and so, after all, in spite of language, in spite of argument, the decision in the case of the Circuit Court of Appeals is forced back upon the proposition that the judgment and death sentence of assured, William E. Burt, in the criminal case, are not only evidence, but conclusive evidence in this case; not merely evidence of their own rendition, but evidence of all the facts on which they were rendered.

If this be the law, then the decision of the Circuit Court of Appeals ought to stand; if it is not the law, then that decision must be reversed, but, whatever the law may be, it ought to receive the final and authoritative sanction of this court, so as to put it beyond further doubt.

All these questions, or rather various phases of this question, were rather elaborately presented to the Circuit Court of Appeals by petitioners in their brief and argument filed in this cause in that court, and such authorities as they were able to find were therein called to its attention, and they now take the liberty of reproducing that brief in full as an appendix to this and pray this court to consider it as part of this brief.

Petitioners respectfully submit that the judgment of the Circuit Court of Appeals for the Fifth Circuit, ought to be in all things reversed, with such directions from this court as will enable them to have a trial upon the merits of their cause.

A. W. TERRELL,

Counsel for Petitioners, S. M. and H. R. Burt.

APPENDIX C.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

UNITED STATES CIRCUIT COURT OF APPEALS.
Fifth Circuit.
November Term, 1900.

Filed December 4, 1900.

S. M. and H. R. Burt, Plaintiffs in Error,
v. No. 864.
Union Central Life Insurance Company, Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Before Pardee, McCormick and Shelby, Circuit Judges:

The case is stated in the opinion.

Mr. Gardner Ruggles was on the brief for plaintiffs in error.

Mr. Geo. E. Pendexter and Mr. Geo. E. Shelby were on the brief for defendant in error.

Shelby, Circuit Judge, delivered the opinion of the court.

This suit is on a life insurance policy and is brought by S. M. Burt and H. R. Burt, citizens of Texas, against the Union Central Life Insurance Company, a corporation chartered under the laws of Ohio. The policy was issued by the defendant on August 1, 1894, for $5000, on the life of William E. Burt, and was payable at his death to his wife, Anna M. Burt, if living, otherwise to the executors, administrators, or assigns of the insured, within sixty days after proof of death. The annual premiums for the policy were duly paid. The policy contained no provision for forfeiture in the event that the insured should be executed under sentence of the law. On September 10, 1895, Anna M. Burt and

William E. Burt assigned in writing to the plaintiffs, to whom they were indebted, a one-half interest in the policy. Anna M. Burt died intestate on July 24, 1896. She left surviving her no descendants, and her husband, William E. Burt, became entitled to any interest she had in the policy. By assignment from William E. Burt, and as his heirs and next of kin, the plaintiffs are the sole owners of the policy.

William E. Burt was indicted for the murder of Anna M. Burt in the District Court of Travis County, Texas, and was tried on November 27, 1896. In addition to the plea of not guilty, he plead insanity. He was found guilty by the jury of murder in the first degree, and was by the court sentenced to be hanged, and on May 27, 1898, pursuant to the sentence, he was executed by the Sheriff of Travis County, Texas. These facts are all alleged in the plaintiffs' petition. The petition then avers that the insured, William E. Burt, was in fact innocent of the crime of which he was convicted. To quote the petition as abridged by the plaintiffs' counsel: "Notwithstanding said conviction and sentence, said William E. Burt did not in fact commit said murder nor participate therein, but that, if he did, his policy was not avoided thereby because he was insane." The defendant demurred to the petition because it appeared therefrom that the insured died at the hands of the law under judgment of a court of competent jurisdiction. The Circuit Court, Judge Maxey presiding, sustained the demurrer. The plaintiffs declining to amend the petition, the case was dismissed. In this court it is assigned that the Circuit Court erred in sustaining the demurrer.

The industry of counsel has been able to find but one case in which a suit was brought on a life insurance policy when the insured had been tried and executed for the commission of crime. That case is the Amicable Society v. Bolland, 4 Bligh, N. R., 194, 211, and it is better known and oftener cited as the Fauntleroy case. It was an action by assignees in bankruptcy to collect a policy of insurance on the life of one Fauntleroy. The policy was made payable to his administrators or assigns. Fauntleroy was convicted of forgery, then a capital offense, and was

executed. The Lord Chancellor (Lyndhurst) delivered the opinion. After stating the case, he said: "The question under these circumstances is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the Noble Lord now present, and we have both come to the conclusion that the assignees cannot maintain this suit."

It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself, this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that contention went at least, altogether void." This case has been cited approvingly in many text-books on insurance and by the Supreme Court of the United States. Ritter v. Mutual Life Insurance Company of New York, 169 U. S., 139. That it correctly states the law has never been questioned so far as we know. It is quoted and relied on by the

learned counsel for both parties to this suit. It is conceded, however, that there is a material difference between the facts of that case and this. Here the petitioners aver that the insured was guiltless, although convicted and executed. They aver in another count that, if he actually killed his wife, he was insane when he committed the act, and that the defense of insanity was presented unsuccessfully at the trial. If the insured did commit the homicide when insane, he was not guilty of murder. The meaning of the petition, therefore, is that at the trial of Burt, the insured, there was a miscarriage of justice—that he was unjustly convicted. It must be and is conceded as settled law that, if he had been rightfully convicted, his assignees could not recover on the policy because, as was held in the Fauntleroy case (stating the point most favorably for the plaintiffs in error), the policy would have been void if it had expressly provided for payment of the amount thereof on the just conviction and execution of the insured. Does a contract for insurance, having no special provision on the subject, cover the loss when the insured is tried and condemned in and executed by an order of a court of competent jurisdiction, when he is in fact innocent of the crime with which he is charged? This precise question, we are advised by counsel, has never been decided. We will apply to the question the illustration used by the court in the Fauntleroy case. Would the policy sued on have been valid if it had provided, in the event of the insured's being indicted, tried, convicted, and executed for murder, when in fact he was innocent, that the amount of the policy should be paid to his administrators or assigns? This condition would not be as encouraging to the insured determined on crime as that supposed by Lord Lyndhurst, but it would at least let him understand that the provision he had made by insurance for those connected with him would not be conclusively lost by his conviction and execution—that the beneficiaries would have a right of action on the policy with chances of success, even if he was apprehended, convicted and executed.

It is well settled that no one can lawfully contract to do that which has a tendency to be injurious to the public or against the

public good. Can there be a legal life insurance against the miscarriage of justice? Can contracts be based upon the probability of judicial murder? If one policy so written be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied, in a kind of accident insurance, to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another court and jury not infallible. That juries and courts do make mistakes is unquestionable. It may be admitted that the history of criminal juri-prudence shows that innocent defendants have in rare instances, by a departure from proper rules of evidence, been convicted of murder and executed. Cases in which the juries, the courts, and the pardoning power are so at fault, are so rare that they are not likely to be in the contemplation of parties making contracts of life insurance. The terms of the contract of life insurance, it seems, would exclude the idea, as in the case of suicide by the insured while sane, that death at the hands of the law was within the contemplation of the contracting parties. Ritter v. Mutual Life Insurance Company of New York, 169 U. S., 139. But if the parties make express contracts on the subject, could the courts lawfully enforce them? It is the policy of every State or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kinds were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon by the executive. Such contracts would encourage litigation and bring reproach upon the State, its judiciary and executive, and would, we think, be against public policy and void. The policy of the law often permits and even requires for error a new trial of a convicted defendant, but never after his execution. The

principle that makes void a wagering contract as to a rise or fall in the price of goods in the markets (Irwin v. Williar, 110 U. S., 499) would make void for stronger reasons a contract based on the failure of courts and juries to perform their respective duties. Now, to apply the reasoning of Lord Lyndhurst in the Fauntleroy case, if a policy with such a form of condition inserted in it in express terms cannot on grounds of public policy be sustained, a policy without such a condition cannot be enforced on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void.

In some cases it has been held that a trial and conviction or acquittal in a criminal case is conclusive as to the facts decided when brought in question by the parties in a subsequent civil suit. Coffey v. United States, 116 U. S., 436; Roberts v. State of New York, 160 N. Y., 217, 224, and 30 Hun. (N. Y.), 106. But the authorities on this subject are conflicting. 1 Freeman on Judgments (4th ed.), Sec. 319, and cases there cited. The assignee takes the policy subject to all defenses and equities which attached to it in the hands of the assignor. Bliss on Life Insurance, Sec. 331. If the judgment of conviction against Burt is conclusive as to his guilt in this suit by the assignees of the policy, this case would be brought precisely within the principle decided in the Fauntleroy case, for the averment in the petition of the conviction of Burt would avoid the effect of the allegation of his innocence. But we prefer to base our conclusion on the ground that a contract of life insurance, written to insure against a capital conviction in the established courts of competent jurisdiction in the event that such conviction is unjust and unwarranted by the evidence, is void as being against public policy.

The judgment of the Circuit Court is affirmed.

APPENDIX D.

DISSENTING OPINION OF McCORMICK, CIRCUIT JUDGE, IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

(Filed December 1, 1900.)

No. 864.

S. M. BURT and D. R. BURT, Plaintiffs in Error.

v.

UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, Defendant in Error.

McCormick, Circuit Judge, dissents.

I cannot concur in the judgment of the court in this case. It seems to me that the case does not call in question in any manner, or come under the authority of, or the reasoning in the case of Amicable Society, etc., v. Bolland, 4 Bligh, N. R., 194, 211.

The action might very well have been brought in the common form on the policy of insurance and left it to the defendant to raise by its answer the questions that are herein raised. The plaintiffs, being so advised, chose to raise the question as they have done in their petition. The petition implies, if it does not expressly announce, that if the insured was in fact guilty of murder, and his death occurred by the execution of the sentence against him for that crime, the proof of such facts would avoid the civil contract on which this action is brought. The holders of the policy, however, expressly allege that the assured did not commit the homicide charged against him, and that if he did commit the homicide he was in such condition of mental disorder as rendered him incapable at the time of committing murder. They alleged that these pleas were presented on the trial of the indictment against the assured, and that on that trial, in a court of competent jurisdiction, the verdict and judgment were rendered against him and sentence of death pronounced upon him and executed. The demurrer, which was sustained in the Circuit Court, must assume either that the death of the assured by a

judicial sentence for crime, though in fact he was wholly innocent and merely the victim of mistake or miscarriage of justice, avoids the policy; or that the judgment of conviction in the criminal case is not only admissible to prove both the sanity and the guilt of the accused, but that it is conclusive evidence of both. I fully concur with counsel for the plaintiffs in error that the first question has never been directly heretofore decided. It is certainly not decided in either the Fauntleroy case or the Ritter case. The first of those cases proceeds upon the admission or assumption that the assured was guilty of forgery as charged, and for which he was executed, no question being made as to his mental condition. In the latter case the question of the assured's sanity was submitted to the jury in the civil suit, and on the evidence and under the charge of the court the jury found against the policy holder. While the elaborate argument in the opinion of the Supreme Court announcing the decision in the case does not show that, if the insanity of the assured had been shown, his suicide while in that condition would not have avoided the policy, it seems to me to strongly imply that it would not.

It seems to me that the ruling of the Circuit Court cannot be sustained except upon the second ground indicated above, and that the practical effect of the judgment of this court is to set aside a general rule, which has received immemorial recognition, to the effect that "a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which it was rendered." This is elementary. The reason of the rule, as expressed by Mr. Greenleaf, is: "If the defendant was convicted, it may have been upon the evidence of the very plaintiff or party claiming the benefit in the civil action; and if he was acquitted it may have been by collusion with the prosecutor." But, beside this, and upon more general grounds, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same. "The judgment of a court of competent jurisdiction, being a public transaction rendered by public authority, is presumed to be faithfully recorded. It is therefore the only proper legal evidence of itself, and is conclusive evidence of the fact of

the rendition of the judgment and of all the legal consequences resulting from that fact, whoever may be parties to the suit in which it is offered in evidence. Thus, if one indicted for an assault and battery has been acquitted and sues for malicious prosecution, the record of acquittal is evidence for the plaintiff to establish that fact, notwithstanding the parties are not the same; but if he were convicted of the offence, and then is sued in trespass for the assault, the record in the former case would not be evidence to establish the fact of the assault, for, as to matters involved in the issue, it is ***res inter alios acta.***" 1 Greenleaf's Evidence, Sections 537, 538.

I am unable to see why public policy (which) not only does not forbid, but seems to require the courts of public justice, at the suit of proper parties, to make new inquiry as to the guilt of one who had been criminally charged and convicted, of making an assault should forbid the making of the inquiry sought to be made in this case as to the real guilt of the assured in the matter for which he was charged, tried and executed. It seems to me that the public interest and a sound public policy give stronger support to the general rule in a case like the present than in a suit for damages by one claiming to have been assaulted by a defendant who had been convicted therefor in a criminal prosecution. In the case of Coffey v. United States, 116 U. S., 436, the parties to the civil suit were the same as the parties in the criminal action; the subject matter was the same; the civil suit, if we may call it so, being for the recovery of a part of the punishment denounced by the penal statute against a crime charged in the criminal action. In that case the court says: "In both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In the case of Roberts v. State, 160 N. Y., 213, the parties in the civil action were the State of NewYork and the claimant, being the same as the parties in the criminal action. And it is not held, as I read the decision, that the judgment of conviction in the criminal action was conclusive as to the fact of the guilt of the accused. On the contrary, the opinion asserts: "It was therefore incumbent upon him, the claimant, to establish that he was improperly convicted and imprisoned, and the amount of damages he had sustained by reason thereof. While a great volume of evidence was given upon the second question, the amount of damages, we find nothing in the record which justified the board in finding that his conviction and imprisonment were improper, but, instead, the evidence upon which he was convicted and the judgment of conviction were introduced, both of which show that his conviction was proper; the former presumptively and the latter conclusively." By this last word "conclusively" the court could not have meant that no other evidence on that subject should have been received, because if that had been their meaning, they would at once have held that the act of the Legislature which authorized the proceeding was a void act, for this act recited upon its face that the claimant had been convicted and imprisoned for the alleged crime of burglary, and no question appears to have been made either in the act or before the Board of Claims that the conviction was not had in a court of competent jurisdiction.

Office Supreme Court U. S.
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Clerk.

No. 282. 70

Brf. of Ramsey for Respondent

Filed Feb. 17, 1902.

In the Supreme Court of the United States,

OCTOBER TERM, A. D. 1901.

No. 282.

S. N. BURT and H. R. BURT, *Petitioners*,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

It will not be presumed that death at the hands of justice is a risk contemplated in contracts of life insurance.

And an express provision of that nature would be contrary to public policy, and void.

These propositions are not affected by any consideration of the actual guilt or innocence of the condemned.

STATEMENT.

The case is fully and fairly stated in the brief for the petitioners.

It seems to be conceded that death under sentence of law, upon just conviction of a capital offence is not an insurable risk. Indeed, this has been settled doctrine since the case of Amicable Society vs. Bolland (4 Bligh, N. R. 194), known as Fauntleroy's case, favorably commented upon by this court as recently as in the case of Ritter vs. Insurance Company (169 U. S. 139, 158). But it is

claimed that death upon an unjust conviction is an insurable risk and, in the absence of express stipulation, presumably within the contemplation of contracts of life insurance.

The petitioners are therefore seeking a recovery upon a supposed insurance against the miscarriage of justice.

The respondent says:

First, the contract does not provide for that contingency.

Second, the laws of Ohio, the place of the contract and of the respondent's domicile, do not contemplate it.

Third, an agreement of that nature would be contrary to public policy, and void.

ARGUMENT.

I.

"A policy of insurance is a contract between A. and B., that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event." 2 Bl. 458.

Where the particular event is of such a nature as to admit of this equation between the premium paid by the one party and the hazard incurred by the other, the law admits the policy into the category of valid contracts; where this equation is not ascertainable, the transaction is speculative and invalid. Parties are presumed to intend lawful contracts. Life insurance is in this category because longevity can be calculated. By the aid of mortality tables the money equivalent of the annual hazard of insurance upon a given life is determined with sufficient certainty to satisfy every requirement of the law. As these tables are at the foundation of life insurance it may not be inappropriate to consider them for a moment.

In 1843 there was published in London, "The Combined Experience, or Actuaries' Table of Mortality." It was prepared by a committee of actuaries from the data furnished by seventeen assurance offices, representing assurances upon 62,537 lives. "The American Experience Table of Mortality," published at a later

date in this country, records the experience of The Mutual Life Insurance Company of New York with 68,000 assurances (Encyc. Brit. "Insurance," pp. 170, 183). These works have always been accepted as standards both in England and America; and one or the other of them has been given official recognition in the statutes of many of the states of the union. The American tables are made the legal standard in Ohio (Sec. 279 Rev. St.).

It is important to note that these are not statistics of the race at large. They do not deal with all sorts and conditions of men, or take into account all human vicissitudes. They are merely a record of the accumulated experience of life insurance, where each of the many thousands of subjects was selected precisely as he is to-day, by an inquiry into his condition and environment as affecting his expectation of life under the operation of natural laws. The medical examination and the data required in applications for life insurance to-day, are for the purpose of ascertaining whether the proposed subject conforms to the description of that purely theoretical person, the composite of thousands who have gone before. If he does, he is credited with the same expectation of life as that other, and the regular premium charged him is thus equivalent to the hazard incurred by his insurer.

It follows that the very nature of the business, and its history, which are matters of common knowledge, as well as the negotiations attending each particular contract, give notice to the parties that the event insured against is death under the operation of natural, not of human laws; laws whose operations may be forecasted.

To illustrate: The rate of premium increases with the age of the insured. The hazard of unmerited capital punishment fortunately does not increase as one grows older. Indeed, at the limit of the insurable age, when life insurance can not be purchased at any price, this particular hazard may be fairly said to have terminated altogether. This consideration alone is sufficient to force upon the mind the conclusion above expressed.

This was the mode of reasoning employed by Mr. Justice Harlan in the case of Ritter (169 U. S. 139) above referred to. He said:

"The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables, showing at any age the probable duration of life" (p. 152).

Again: " . . . a policy stipulating generally for the payment of the sum named in it upon the death of the assured, should . . . be interpreted as intended to cover . . . only death occurring in the ordinary course of his life" (p. 152).

And further, after referring to certain familiar clauses in the contract:

"These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured" etc. (p. 153).

Adopting the language of the chief justice of the supreme court of Alabama in the case of Supreme Commandery vs. Ainsworth (71 Ala. 436, 446), he said:

"In all contracts of insurance, there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property, or health, or life, is usually subject to," etc. (p. 157).

I do not overlook the fact that life insurance includes the hazard of death from external causes; but that is only to the extent that such external causes are accidental in the legal sense. It is hardly necessary to argue that the lawful execution of the judgment of a court of competent jurisdiction is not an accident, however large a part accident may have played in the course of events leading to the judgment.

Since it is conceded that the parties presumably do not contract with reference to capital punishment justly administered, certainly it follows that some unequivocal expression should appear in the contract in order to persuade the reasonable mind that nevertheless the risk of judicial murder was contemplated. For it is hardly conceivable that the parties would intentionally make any such distinction. It is not uncommon to find policies expressly excluding the event of death at the hands of the law; but I have found no single instance where, with that subject thus prominently before the minds of the contracting parties, any inquiry into the actual guilt or innocence of the condemned was provided for. It seems to be well settled that the words "death at the hands of the law" or their equivalent, relate only to the nature of the death itself and not to any of the causes or conditions which may have preceded it.

3 Joyce on Insurance, Sec. 2611.

As early as in the leading case of Clift vs. Schawbe (3 Mann. Gr. & S. 436), where the policy under consideration excluded death "by duelling or by the hands of justice," Patteson, J., observed:

"I apprehend that the actual felony is no part of the cause of exception from liability. If it were, it would be competent to the plaintiff to prove that the deceased, although dying by the hands of justice, was in truth innocent of the crime for which he suffered; in the same manner as it is, no doubt, competent to an executor to traverse an inquest of felo de se, found upon view of the body of his testator by a coroner's jury; or that the deceased, although killed in a duel, had fired his pistol in the air and never contemplated shooting at his opponent. Such defences would surely be excluded, for the words of the exception are express— 'die by the hands of justice,' whether justly or not, or 'by duelling,' whether it were felony or not" (p. 466).

II.

The respondent is a corporation organized under the laws of Ohio and the contract was made in Ohio. A brief reference to the statutes of that state will show that death under the operation of

natural laws was the only insurable risk contemplated by the legislature.

Section 3587 Rev. St. authorizes the formation of companies "to make insurance upon the lives of individuals;" and section 3596 prohibits them from undertaking "any business or risk, except as herein provided."

By section 3623 the application is made a part of the contract and required to be copied into the body of the policy delivered to the insured, thus showing a legislative intent to base the contract upon a calculation of the natural duration of life; indeed, that phraseology is used in Sections 3628 and 3629, i. e.: "for the term of his natural life."

Section 3603 requires the filing of an annual statement which shall exhibit, among other things, the age of each policy holder at the inception of his contract. Section 3630, e. requires the same thing of foreign life insurance companies, with this addition: that sixty-five years is made for them the limit of insurable age. Are gentlemen who have remained secure against fatal mistrial until that ripe age, thereafter peculiarly susceptible to it? or did the legislature consider that it was dealing with the subject of natural longevity in this chapter?

This purpose is forcibly suggested by certain sections touching discrimination. Section 3631-1 prohibits the insurer from discriminating in any manner between colored and white persons "of the same age, sex, general condition of health and hope of longevity." The next section requires the company to furnish each rejected colored applicant with a certificate, stating that the rejection was not on account of color, but solely upon "grounds of the general health and hope of longevity," as determined by the tests applied to white persons. The next section repeats the language of the two preceding and imposes penalties for their violation. If the Ohio legislature contemplated insurance against unjust conviction of capital offences, it might well have paused before enacting this law; a law which sprang from the legislative recognition of

a race prejudice—the kind of thing which conduces, if anything does, to unfair trial.

Section 3631-4 and those immediately following, deal with the subject of discrimination generally, prohibiting, under the severest penalties, "any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life."

Lastly, as heretofore noted, the American tables, which afford no basis for calculating the results of criminal trials, are made the legal standard in Ohio. "The rate of mortality shall be established by the tables known as the American experience tables," etc. (Sec. 279 Rev. St.).

III.

"Can there be a legal life insurance against the miscarriage of justice? Can contracts be based upon the probability of judicial murder?" Shelby, J., printed record, p. 24.

This statement of the question by the learned judge delivering the majority opinion below, is so rich in suggestion as to at once marshal before the mind every consideration of public policy bearing upon it. The question must be answered in the negative for the following reasons:

Insurance against the miscarriage of justice would be a mere gambling transaction. The hazard could not be measured in experience tables. The premium could not be calculated to the approximation of a quid pro quo. Are there any data extant, or procurable which enable us to say that one per cent. or that one hundredth of one per cent. of the persons who have suffered capital punishment, were innocent? or at what age the hazard is greatest? Such a contract would not differ in principle from gambling upon the rise and fall of markets, which is held invalid.

Williar vs. Irwin, 110 U. S. 499.

Bryant vs. Telegraph Co., 17 Fed. 825.

It would be tainted with the added vice of wagering upon the results of trial, having a tendency to influence the administration of justice. It was held in England as early as in the case of Evans vs. Jones (5 Mees. & W. 77), when wagers were not per se unlawful, that "a wager as to the conviction or acquittal of a prisoner on trial on a criminal charge, was illegal, as being against public policy."

Lord Abinger observed:

"No man has a right to acquire, by his own act, an interest in interfering with the proceedings of courts of justice, more especially of criminal justice, in which a man is bound honestly to declare all he knows relative to the case in course of adjudication. Here the party had acquired by the wager a direct interest in procuring the conviction of the prisoner; and, although it is impossible to say in what precise manner an improper bias may be exerted, or whether it will have any effect or not, yet the very tendency of his mind to act in such a way as to pervert the course of justice, is a sufficient foundation for the illegality of such wagers" (p. 81).

Baron Parke concurred in these words:

"I entirely agree. No case has been cited at variance with the principle laid down by the Lord Chief Baron. It appears to me that it is a reasonable objection to the legality of a wager that it has a tendency to influence and pervert the course of criminal justice. There ought to be a disposition in every person to come forward and give any evidence which he may be in possession of, tending to insure either the acquittal or conviction of a person lying under a criminal charge; but the necessary tendency of a wager of this description is to induce the party to it either to give false testimony, if it be his interest to procure a conviction, or, if the other way to withdraw from the court evidence which he may either possess at the time of laying the wager, or which may afterwards come to his knowledge. And even if a party be not in a situation to suppress or fabricate evidence, still he may influence the result of the trial by prejudicing the public mind on the case, and thus deprive the party charged, of the fair trial to which he is entitled" (p. 82).

Baron Maule added:

"It is too late now to say that no wager can be enforced by law: but I think it would have been better if they had been originally left to the decision of the Jockey Club. This wager is clearly objectionable, as the tendency of it is to prejudice the course of public justice; and, whenever a wager has such a tendency, it is against public policy and is therefore void" (p. 82).

The remedy for the enforcement of such a contract, would involve collateral attack upon judgments. The record of the conviction would be a necessary item of evidence upon the issue of capital punishment. To permit the parties thereafter and in the same cause to offer evidence of the innocence of the condemned, would be to put directly in issue the propriety of the judgment in the criminal proceeding.

I do not contend for the estoppel of res judicata in favor of that judgment; for the weight of authority is clearly against it. A civil action will lie for the tort of murder and the result will not be prejudiced by a prior judgment either of acquittal or conviction in the prosecution for the crime. But that does not involve any collateral attack. The two proceedings follow parallel lines and do not touch at any point. The issue is the same in both cases and each pursues that issue independently and without cognizance of the other's existence.

But in the supposed case the issues would not be the same as in the criminal prosecution. The two proceedings would not follow parallel lines; they would clash at right angles. A recovery on the policy would not depend on the guilt or innocence of the insured. He might commit murder and yet, through flight or acquittal, live out his expectation of life and at the end mature his policy. (Q. Could the insurer cancel his policy after an acquittal, on the ground that he ought to have been hanged?) The recovery would depend on whether or not he was rightly or wrongly hanged; that would be the issue in the case. Such collateral attack is forbidden upon weightiest considerations of public policy.

"It is the policy of every state or organized society to uphold the dignity and integrity of its courts of justice. Such contracts . . . would tend to encourage a want of confidence in the effeciency of the courts. They would tend to stir up litigation—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kinds were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon by the executive. Such contracts would encourage litigation and bring reproach upon the state, its judiciary and executive." Shelby, J.

Even in actions for malicious prosecution, where, after the record of acquittal is introduced, the defendant is permitted to offer evidence which may tend to show that the plaintiff, though acquitted, was nevertheless guilty, the testimony is not admissible upon an issue of guilty or not guilty, much less upon an issue of right or wrong acquittal; but merely upon the issue of probable cause, justifying the prosecution.

Such insurance would have a tendency to persuade an innocent accused to barter away his defense, or even to plead guilty, leaving the proofs of his innocence in the hands of his family for their recovery of the funds. This might be prompted by a morbid sense of duty to an ill-provided family, or by mere suicidal impulse. In the latter aspect it would come strictly within the principle and reasoning of Ritter vs. Insurance Company already cited. In any case the right and duty to defend against unjust accusation can not be bartered away, any more than one may lawfully consent to his own murder—or vivisection, to cite a recent instance.

"There are certain fundamental rights which no man can barter away, such for instance, as his right to life and personal freedom, and, in criminal cases, the right to be tried by a jury of his peers. Courts have even gone so far as to say that a man can not consent to be tried by a jury of less than twelve men, whatever may be the circumstances under which the twelfth man may be taken from the panel." Mr. Justice Brown, in Pope M'f'g. Co. vs. Gormully, 144 U. S. 224, 234.

To some extent, also, such insurance would have a tendency to encourage crime. In Fauntleroy's case, Lord Lyndhurst declared that insurance against merited capital punishment would have such a tendency, thus:

"Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crime? namely, the interest we have in the welfare and prosperity of our connections?"

The learned judge below gave to the less extreme supposed case under consideration its just significance, when he said:

"This condition would not be as encouraging to the insured determined on crime as that supposed by Lord Lyndhurst, but it would at least let him understand that the provision he had made by insurance for those connected with him would not be conclusively lost by his conviction and execution—that the beneficiaries would have a right of action on the policy with chances of success, even if he was apprehended, convicted and executed." Shelby, J.

COMMENT.

The learned circuit judge who dissented from the majority opinion below, and the counsel for the petitioners, misconceive the questions at issue. They argue, first, that liability hinges upon the guilt or innocence of the insured; and second, that the record of conviction is not conclusive upon that issue.

It has not been claimed at any time that the record was conclusive upon the issue of guilt or innocence; but merely that that was not the issue involved: that life insurance deals with the conduct of the insured only in so far as it may have a bearing on the question of proximate cause of death. If an insured is killed while engaged in murder, and because of it, his guilty act is the proximate cause of death, and is the issue in an action on the policy. So if, as in Ritter's case, he die by his own deliberate act. But where his death is at the hands of justice the judicial judgment is the proximate cause and the sole issue in the case. The circumstances of

suspicion leading to the arrest, the indictment, the plea, the trial, are so many independent intervening links in the chain of causation. The actual fact back of all these events is remote.

The argument upon the constitutionality of the statute of Texas imposing a penalty of interest and attorneys' fees in insurance cases, is premature. It was not considered in either court below, and can not become pertinent until the respondent's liability has been determined.

CONCLUSION.

To this supposed insurance against judicial murder, the language of Mr. Justice Harlan touching insurance against suicide is most appropriate:

"A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment" (p. 154).

No countervailing argument can be made upon the suggestion that any considerable number of persons would suffer hardship under the rule of public policy asserted by the respondent. In the whole history of life insurance, we have only one recorded litigation upon a policy on a life terminated by the hand of justice; and even in that case, it was apparently conceded by the parties and assumed by the court, that the propriety of the execution could not be inquired into.

Public policy, as a rule of law, is molded in public sentiment. Here is the record of more than sixty years of popular acquiescence in the doctrine there laid down and for which respondent now contends. If its tendency were more injurious to the public good than the evil which it seeks to avert, that fact would have manifested itself in the courts long before the commencement of this action.

"It is impossible to define with accuracy what is meant by 'that public policy for an interference and violation of which, a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public *as understood at the time* fall within the ban." Mr. Justice Brown, in Pope M'f'g. Co. vs. Gormully, 144 U. S. at p. 233.

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals, affirming the judgment of the Circuit Court, should be affirmed.

ROBERT RAMSEY,
For the Respondent.

Supreme Court of the United States.

No. 70.—October Term, 1902.

S. M. Burt and H. R. Burt, Petitioners. vs. The Union Central Life Insurance Company. } On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 22, 1902.]

This was an action, to recover on a policy of life insurance, commenced in the District Court of Travis County, Texas, and removed to the Circuit Court of the United States for the Western District of Texas. The policy was issued August 1, 1894. William E. Burt was the insured. The policy, in case of death, was payable to Anna M. Burt, the wife of the insured, if living, otherwise to his executors, administrators or assigns. On September 10, 1895, the beneficiary Anna M. Burt and her husband, the insured, assigned a one-half interest to plaintiffs to secure them as creditors of the assignors. On July 24, 1896, the beneficiary, Anna M. Burt, died intestate, as did also the only children of the beneficiary and the insured. On February 4, 1897, the insured, William E. Burt, conveyed to the plaintiffs the remaining interest in the policy, making them the sole owners of it. They are also his sole heirs, and as such are entitled to the full benefit of the policy, there being no administration on his estate nor any necessity for one.

On November 27, 1896, the insured, having been indicted for the murder of his wife, Anna M. Burt, the beneficiary, was tried and convicted in the District Court of Travis County, Texas, a court of competent jurisdiction, was sentenced to be put to death, and on May 27, 1898, was hanged pursuant to such sentence. The petition in this case alleged that, notwithstanding such conviction, sentence and execution, the insured, William E. Burt, did not in fact commit the crime of murder, nor participate therein, but that if he did the policy was not avoided thereby, because he was at the time insane.

The policy, which in its general scope was an ordinary policy of life insurance, contained these provisions:

"Third. If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by

self-destruction, whether sane or insane, within three years from date hereof, this policy shall be null and void.

* * * * * *

"The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same."

A demurrer to the petition was sustained and judgment entered for the defendant, which was thereafter affirmed by the Court of Appeals of the Fifth Circuit, (105 Fed. Rep. 419,) and thereupon the case was brought here on certiorari. (181 U. S. 617.)

Mr. Justice BREWER delivered the opinion of the Court.

There is nothing in the policy which in terms covers the contingency here presented, the extracts therefrom given in the preceding statement being all that even remotely by suggestion or inference can have any bearing. The question therefore is whether an ordinary life policy, containing no applicable special provisions, is a binding contract to insure against a legal execution for crime. The petitioners would distinguish between cases in which the insured is justly convicted and executed and those in which he is unjustly convicted. The allegation here is that, notwithstanding his conviction and execution, he was not in fact guilty, that he did not participate in the killing of his wife, and that if he did he was insane at the time, and therefore not responsible for his actions.

Accepting the division made by counsel as one facilitating a just conclusion concerning the rights of the parties hereto, we inquire, first, whether a policy of life insurance is a contract, binding the insurer to pay to the beneficiary the amount of the policy in case the insured is legally and justly executed for crime. In other words, do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?

The researches of counsel have found but one case directly in point, *The Amicable Society* v. *Bolland*, decided by the House of Lords in 1830, and reported in 4 Bligh N. S. 194, 211. The Lord Chancellor, delivering the opinion, after stating the question, answered it in the following brief but cogent words:

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year upon condition that, in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our con-

nexions? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went, at least, altogether void?"

There are some differences between that case and the present in the surrounding facts, but none that are material. There the policy was taken out for the benefit of the insured's estate. Here the beneficiary was the wife of the insured, or, if she should not be living at the time of his death, his estate. As her death preceded his, the conditions of the insurance became practically the same. In that case the insured had assigned all his interest in the policies upon certain trusts, though the plaintiffs were his assignees in bankruptcy. Here he and his wife, the original beneficiary, transferred a half interest to these plaintiffs, who were their creditors, but the amount of the indebtedness is not shown, and the policy provided "should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest produced with proofs of death. This company does not guarantee the validity of any assignment;" a requirement which does not appear to have been complied with. So that the rights of the plaintiffs depend mainly if not wholly upon the fact of the assignment made by the insured after the killing of his wife and prior to his execution, and the further fact that they are his sole heirs. The plaintiffs therefore in each of the cases claimed directly under the insured and sought to recover on a policy obtained by him, the maturity of which was accelerated by his execution for crime. In neither policy was there any express stipulation in respect to such a contingency, so that the reasoning of the Lord Chancellor is pertinent to this case, and it is reasoning the force of which it is impossible to avoid. It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for.

That case was cited with approval in *Ritter* v. *Mutual Life Insurance Company*, (169 U. S. 139,) in which we held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when he in sound mind intentionally took his own life—and this irrespective of the question whether there was a stipulation in the policy to that effect or not. In the opinion other cases were cited bearing more or less directly on the general question. Among them was *New York Mutual Life Insur-*

ance Company v. *Armstrong*, (117 U. S. 591, 600,) an action by the assignee of a life insurance policy, and the defense that the assignee murdered the insured in order to get the benefit of the policy, in respect to which Mr. Justice Field, speaking for the court, said:

"It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

Also *Hatch* v. *Mutual Life Insurance Company*, (120 Mass. 550, 552,) an action on a policy of insurance on the life of a married woman whose death was caused by a miscarriage produced by illegal operation performed upon and voluntarily submitted to by her with an intent to cause an abortion, and without any justifiable medical reason for such an operation, from the opinion in which these words were quoted:

"We can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this commonwealth."

Also *Supreme Commandery &c.* v. *Ainsworth*, (71 Ala. 436, 446,) a case of the suicide of the insured, in which is this language:

"Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk and hasten the day of payment of the insurance money. . . . The fair and just interpretation of a contract of life insurance made with the assured is that the risk is of death proceeding from other causes than the voluntary act of the assured producing or intended to produce it. . . . The extinction of life by disease, or by accident, not suicide voluntary and intentional by the assured while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime."

But the stress of the plaintiffs' contention rests on the allegation that the insured was unjustly convicted and executed; that he did not in fact commit the crime of murder or participate therein, and that if he did it was while he was insane and not responsible for his actions. It is urged that according to the authorities heretofore cited the risk which is not insured against is death as a punishment for crime; that if there be no crime, no wrong done by the insured, the mere fact of his death as the outcome of proceedings in a court of justice does not vitiate the contract of insurance unless there is some express stipulation therefor. It is said that the adjudication in the criminal case is not as to these plaintiffs conclusive of the insured's guilt; that they may show in this independent action facts which would satisfy a jury that the outcome of those legal

proceedings was unjust because the insured did not participate in the crime, or if he did that he was legally irresponsible therefor by reason of insanity. It is not doubted that the criminal prosecution was an adjudication of the insured's guilt, his sanity and legal responsibility for the crime, but the principle of *res judicata* is that a judgment is conclusive only as between the parties and their privies, and these plaintiffs say they were not parties to the criminal action and are not privies to either party thereto.

If the case turned on the applicability of the principle of *res judicata* there would be little difficulty in reaching a conclusion. There is no identity of parties, nor are the two parties to this action privies to those in the criminal proceeding. A judgment in a criminal prosecution for assault and battery cannot be invoked as *res judicata* in a civil action by the party injured to recover damages. But there the two actions run along parallel lines, and the relief sought in each is the direct and natural result of the wrong complained of. Here, the civil action is founded upon the result of the other—cannot be maintained but for the fact of that result. If the insured had been acquitted there would have been no cause of action on the policy, while the fact that the defendant in the illustration given was acquitted of the criminal offense would not bar the civil action to recover damages. (*Cottingham* v. *Weeks*, 54 Ga. 275.)

This action can be maintained only on the assumption that there was a failure of justice in the criminal case. It implies a miscarriage of justice. But can there be a contract of insurance against the miscarriage of justice? In the opinion of the Court of Appeals the question is thus stated and answered:

"Can there be a legal life insurance against the miscarriage of justice? Can contracts be based on the probability of judicial murder? If one policy so written be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied, in a kind of accident insurance, to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another jury and court not infallible.

* * * * * *

"It is the policy of every State or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kind were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon of the executive. Such contracts would encourage litigation and bring reproach upon the State, its judiciary and executive, and would, we think, be against public policy and void. The policy of the law often permits and even requires for error a new trial of a convicted defendant, but never after his execution."

The views thus expressed commend themselves to our judgment. There is a wagering feature in such a stipulation which forbids its being incorporated into a policy of insurance, and if it cannot be formally incorporated into the contract its omission therefrom does not by implication give it life and validity.

See to what any other conclusion would lead: Suppose beneficiaries at the time of the trial of an insured for murder were possessors, and the sole possessors, of a knowledge of facts that would establish his innocence. As good citizens it would be their duty to furnish that evidence and thus prevent a miscarriage of justice. As beneficiaries it would be their interest to withhold their evidence and thus let an innocent man be punished. Can a contract be upheld which is not only a wager upon the result of criminal proceedings but also tends to place before individuals an inducement to assist in bringing about such miscarriage of justice?

In *Evans* v. *Jones*, (5 Mees. & W. 77,) an action was brought on a wager as to the conviction or acquittal of a prisoner on trial on a criminal charge, and it was held that the action could not be sustained. Lord Abinger observed: "No man has a right to acquire, by his own act, an interest in interfering with the proceedings of courts of justice, more especially of criminal justice, in which a man is bound honestly to declare all he knows relative to the case in the course of adjudication. Here the party had acquired by the wager a direct interest in procuring the conviction of the prisoner; and although it is impossible to say in what precise manner an improper bias may be exerted, or whether it will have any effect or not, yet the very tendency of his mind to act in such a way as to pervert the course of justice, is a sufficient foundation for the illegality of such wagers." (p. 81) Baron Parke concurred in these words: "I entirely agree. No case has been cited at variance with the principle laid down by the Lord Chief Baron. It appears to me that it is a reasonable objection to the legality of a wager that it has a tendency to influence and pervert the course of criminal justice. There ought to be a disposition in every person to come forward and give any evidence which he may be in possession of, tending to insure either the acquittal or conviction of a person lying under a criminal charge; but the necessary tendency of a wager of this description is to induce the party to it either to give false testimony, if it be his interest to procure a conviction, or, if the other way, to withdraw from the court evidence which he may either possess at the time of laying the wager, or which may afterwards come to his knowledge. And even if a party be not in a situation to suppress or fabricate evidence, still he may influence the result of the trial by prejudicing the public mind on the case, and thus deprive the party charged of the fair trial to which he is entitled." (p. 82.)

It may be said the plaintiffs have made no contract in which any element of wager exists. The contract was between the insured and the company, and in that there was no other element of wager than is found in any ordinary insurance policy. This may be technically true. The plaintiffs made no contract, but they are seeking to enforce one containing, so far as they are concerned, all the elements which, as indicated in the quotations just made, forbid its enforcement on the ground of public policy They claim in part, under an assignment made before the homicide, the value of which, however, they do not disclose, and they were the heirs of the insured, and after the death of his wife and children, would, in the absence of any will, become the beneficiaries in full. So they stood prior to the trial, with a personal interest drawing them in one direction and a public duty which might possibly compel active efforts in a contrary direction. That these plaintiffs may have known nothing in respect to the circumstances of the homicide, or been unable to furnish any evidence *pro or con* on the matter of insanity, is immaterial. It is enough that the contract has such a tendency, and it is not essential that, in fact, it produced a conflict in the minds of these plaintiffs or changed their conduct.

The judgment of the Court of Appeals is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.